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A TREATISE

ON

THE MODERN LAW

OF

MUNICIPAL SECURITIES

INCLUDING

RIGHTS AND REMEDIES

AS DETERMINED BY THE COURTS AND STATUTES OF THE UNITED STATES

WITH FORMS AND DIRECTIONS

BY

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JUDGE UNITED STATES DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT

INDIANAPOLIS AND KANSAS CITY

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CHAPTER I.

DEFINITIONS AND NATURE OF MUNICIPAL SECURITIES.

§ 1. A municipal corporation defined.
2. Definitions by various American courts.
3. Municipal securities defined and classified.
§ 4. Definition and nature of municipal bonds.
5. Definition and nature of municipal warrants.
6. Definition and nature of coupons.

§ 1. A municipal corporation defined.—A municipal corporation, in its strict and proper sense, is a body politic and corporate, established by law, to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of a city, town or district which is incorporated.[1] Abbott, in his Law Dictionary, defines a municipal corporation as embracing that class of corporations which are created to administer local government subordinate to the general sovereignty of the state or kingdom; which includes cities, towns, incorporated villages, boroughs and other forms of public corporations. A municipal corporation in its broadest sense, and as contemplated in this treatise, is a body politic, such as the state and each of the governmental subdivisions of the state, such as cities, towns, villages, counties, townships and school districts.

§ 2. Definitions by various American courts.—A municipal corporation is a subordinate branch of the domestic government of a state.[2] It is a body corporate and politic established by law to share in the civil government of a country, but chiefly to regulate the local or internal affairs of a city, town

[1] 1 Dillon on Munic. Corp., § 19. See, also, 1 Beach Pub. Corp., § 5; Folsom *v.* Twp., 159 U. S. 611, 16 Sup. Ct. R. 174, 179.

[2] Mayor of Nashville *v.* Ray, 19 Wall. 475.

or district which is incorporated.[1] A municipal corporation is a public corporation created by the government for political purposes, and having subordinate and local powers of legislation; an incorporation of persons, inhabitants of a particular place or connected with a particular district enabling them to conduct its local civil government. It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of the government.[2]

The supreme court of Iowa has held that the term "municipal corporation," when strictly used, applies to cities only. But the term usually has a much more extended meaning, and when applied to corporations the words "political," "municipal" and "public" are often used interchangeably.[3] In the constitution of Wisconsin, however, the term "municipal corporation" has been held not to include towns, and when used in the statutes of that state must be taken in a strict constructive sense, unless a different intention on the part of the legislature is clear.[4]

The supreme court of Missouri has held that the incorporated board of public schools was not a municipal corporation within the meaning of an act declaring that no person shall be eligible to a certain office who shall hold any office under a municipal corporation.[5] The supreme court of Nebraska has held that a village in that state was a municipal corporation.[6] The District of Columbia has been declared to be a municipal corporation by the supreme court of the United States.[7]

[1] East Tennessee University *v.* Knoxville, 6 Baxt. (Tenn.) 166; Hamilton Co. *v.* Mighels, 7 Ohio St. 109.

[2] Philadelphia *v.* Fox, 64 Pa. St. 180; Williamsport *v.* Commonwealth, 84 Pa. St. 487. A township is held to be a municipal corporation in Pennsylvania. Sprague *v.* Baldwin, 18 Pa. Co. Ct. R. 568. See, also, Folsom *v.* Township, 159 U. S. 611, 16 Sup. Ct. R. 174.

[3] Curry *v.* Sioux City, 62 Iowa 102; Iowa R. Land Co. *v.* Carrol Co., 39 Iowa 151; Township of West Bend *v.* Munch, 52 Iowa 132; Clark *v.* Thompson, 37 Iowa 536; Winspear *v.* District Township, 37 Iowa 542; Des Moines Co. *v.* Harker, 34 Iowa 84.

[4] Eaton *v.* Supervisors of Manitowoc Co., 44 Wis. 489; Morton *v.* Peck, 3 Wis. 714; State *v.* Milwaukee, 20 Wis. 87; Crane *v.* Fond du Lac, 16 Wis. 196; Watertown *v.* Cady, 20 Wis. 501.

[5] Heller *v.* Stremmel, 52 Mo. 309.

[6] City of Wahoo *v.* Reeder, 27 Neb. 770, 43 N. W. Rep. 1145.

[7] Stoutenburgh *v.* Hennick, 129 U. S. 141. For other definitions and illustrative cases, see Cudden *v.* Eastwick, Salk. 183; People *v.* Hurlbut, 24 Mich.

§ 3. **Municipal securities defined and classified.**—The term "municipal securities," in its broadest sense, and as contemplated in this treatise, embraces bonds, coupons, warrants and other evidences of indebtedness issued by cities, towns, counties, school districts and other subdivisions of the various states and territories in the United States. These securities are primarily divided into two great classes: First, municipal bonds, negotiable in form, payable at a future day, intended for sale and circulation in the market of negotiable securities and issued under express authority of the legislature. Such bonds usually have coupons attached, which partake of the nature of the bond, are likewise negotiable, and may be detached and held separately from the bonds. Second, municipal warrants, orders or certificates. These are commonly drawn by one or more of the officers of the municipality upon its treasurer, directing him to pay the person named, or order, or bearer, a given sum of money.

§ 4. **Definition and nature of municipal bonds.**—Municipal bonds may be defined to be evidences of indebtedness issued by cities, towns, counties, school districts and other subdivisions of the state, negotiable in form, payable at a future day, transferable by indorsement or delivery, as a rule, under the seal of the corporation issuing the same and bearing interest payable annually or semi-annually, usually with interest coupons attached. These securities are issued, as a rule, by municipalities for the purpose of raising money to enable them to carry out some of the express powers vested in them as governmental agencies. Such securities are clothed with all the attributes of commercial paper, pass by delivery or indorsement, and are not subject to equities, where the power to issue them exists, in the hands of *bona fide* holders for value, before maturity and without notice.

The legislature may confer upon municipal bonds all the

44; People *v.* Morris, 13 Wend. 325; Meriwether *v.* Garrett, 102 U. S. 472, 511; New Orleans *v.* Clark, 95 U. S. 644, 654; Kilgore *v.* Magee, 8 Pa. St. 411; Justice *v.* City of Logansport, 101 Ind. 326, 327; Mather *v.* City of Ottawa, 114 Ill. 659, 3 N. E. R. 216, 218; Wetherell *v.* Devine, 116 Ill. 631, 6 N. E. R. 24, 27; Elliott on Roads and Streets, 326; 1 Beach Pub. Corp., § 5.

characteristics of commercial paper, such as negotiability and protection in the hands of innocent holders for value.[1]

The supreme court of the United States, speaking by Mr. Justice Grier, gave the following description of this class of commercial securities: "This species of bonds is a modern invention intended to pass by manual delivery and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by states and corporations they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law can not prohibit the commercial world from inventing or using any species of security known in the last century. Usage of trade and commerce are acknowledged by the courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability, to suit the necessities and usages of the mercantile and commercial world, is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it can not be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, can not be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanction of judicial recognition, not only in this court, but of nearly every state in the Union, is well known and admitted."[2]

Daniel, in his excellent treatise on Negotiable Instruments, says: "The inventive spirit of modern finance and commerce, stimulated by the prodigious strides of internal improvements, has thrown into circulation a new species of security for money which has sprung at once to the front rank of negotiable instruments. They constitute a vast portion of the wealth of this country, and questions daily arising respecting

[1] Alvord *v.* Syracuse Savings Bank, 98 N. Y. 599.

[2] Mercer Co. *v.* Hackett, 1 Wall. 83.

their validity are of the utmost nicety, and of the highest importance to communities bound to their payment, as well as to the capitalists and business men trading in them as mercantile commodities."[1]

§ 5. **Definition and nature of municipal warrants.**—A municipal warrant or order may be defined to be an instrument, generally in the form of a bill of exchange, drawn by an officer of a municipality upon the treasurer, directing him to pay an amount of money specified therein to the person named, or to his order or to bearer. While these instruments are usually in the form of commercial paper, they do not possess the qualities of such paper. They are regarded as orders of the corporation on itself, and, in substance, the mere promise of the corporation to pay the amount specified therein. They do not possess the qualities of negotiable paper so that the holder for value obtains an absolute title, free from all equities between the original parties.

The supreme court of the United States has described these instruments to be "vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the use of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due the public creditors; and are, therefore, necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes out of which they must ultimately be paid."[2]

§ 6. **Definition and nature of coupons.**—The term "coupon" is derived from the French "couper—to cut," and is defined by Worcester, in his dictionary, to signify "one of the interest certificates attached to transferable bonds, and of which there are usually as many as there are payments to be made; so called, because it is cut off when it is presented for payment." They are not strictly independent instruments, like promissory notes for a sum of money, but are given for interest thereafter

[1] 1 Daniel on Neg. Inst., § 1486.

[2] Mayor of Nashville *v.* Ray, 19 Wall. 468.

to become due upon the bonds to which they belong, which interest is parcel of the bonds, and partakes of their nature. They are given to the holders of the bonds, for the purpose of enabling them to collect each installment of interest as it matures, without being compelled to produce his bond, which, if necessary, would be productive of much inconvenience to the holder, especially if he should reside in a foreign country, besides exposing him to the loss of his bonds in the course of transmission. They are intended also for negotiation to bearer, in business transactions, so as to authorize the holder to collect them. They also serve the additional purpose of providing the municipality with vouchers for the payment of interest.[1]

[1] Mercer Co. *v.* Hackett, 1 Wall. 83; Thompson *v.* Lee Co., 3 Wall. 327; McCoy *v.* Washington Co., 3 Wall. 381; City of Aurora *v.* West, 7 Wall. 125; Clark *v.* Iowa City, 20 Wall. 583; Knox Co. *v.* Aspenwall, 21 How. 539; Town *v.* Culver, 19 Wall. 84; City of Kenosha *v.* Jamson, 9 Wall. 477; Smith *v.* County of Clark, 54 Mo. 58; Arants *v.* Commonwealth, 18 Grat. (Va.) 776. But when it is said that they are not strictly independent instruments like promissory notes it is not meant that they may not, in most cases, be severed from the bonds and pass by delivery from hand to hand so as to vest a complete title in a *bona fide* purchaser and be sued on separately. Com. *v.* Chesapeake, etc., Co., 32 Md. 501; Spooner *v.* Holmes, 102 Mass. 503, 3 Am. R. 491; Brainerd *v.* New York, etc., Co., 25 N. Y. 496; Evertson *v.* Nat. Bank, 66 N. Y. 14; County of Beaver *v.* Armstrong, 44 Pa. St. 63.

CHAPTER II.

GENERAL POWERS AND LIABILITIES OF MUNICIPAL CORPORATIONS.

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34. Rights of creditors as affected by annulling charter of city.

§ 7. General nature and powers of municipal corporations.— Municipal corporations have only such powers as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. They can bind the people

and property only to the extent of their powers.[1] They are merely agents of the state government for local purposes, and possess only such powers as are expressly given, or implied because essential to carry into effect such as are expressly granted.[2]

A municipal corporation is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as the legislature deems adequate to the ends to be accomplished.[3] It is not strictly confined, however, to the powers expressly and specifically conferred upon it by its charter, for it also possesses such as are necessarily incident to, or may fairly be implied from, those powers, including all that are essential to the declared object of its existence.[4]

§ 8. **The measure of corporate power.**—Municipal corporations can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purpose of their association. This principle is derived from the nature of corporations, the mode in which they are organized, and in which their affairs must be conducted.[5]

[1] Ottawa *v.* Carey, 108 U. S. 110; Higgins *v.* City of San Diego, 118 Cal. 524, 45 Pac. R. 824.

[2] Barnett *v.* Denison, 145 U. S. 135; Hill *v.* Memphis, 134 U. S. 198.

[3] The Mayor *v.* Ray, 19 Wall. 468; Minturn *v.* Larue, 23 How. 435; Barnes *v.* District of Columbia, 91 U. S. 540.

[4] Cooley on Const. Lim. 231; City of Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. R. 849; Corporation of Bluffton *v.* Studebaker, 106 Ind. 129; City of Bridgeport *v.* Housatonic, etc., R. Co., 15 Conn. 475, 501; City of Raleigh *v.* Peace, 101 N. Car. 32, 14 S. E. R. 521, 523, 17 L. R. A. 330, 333, citing Elliott on Roads and Streets, 374.

[5] Spaulding *v.* Lowell, 23 Pick. 71; Bangs *v.* Snow, 1 Mass. 181; Stetson *v.* Kempton, 13 Mass. 272; Willard *v.* Newburyport, 12 Pick. 227; Keyes *v.* Westford, 17 Pick. 273; Merriam *v.* Moody, 25 Iowa 163; City of Lafayette *v.* Cox, 5 Ind. 38; Paine *v.* Spratley, 5 Kan. 525; Board, etc., of Hamilton Co. *v.* Mighels, 7 Ohio St. 109; Hayes

Hence the charter itself, or the general law under which they exist, is the true measure of corporate power.

The charter or statute by which municipal corporations are created is its constitution or organic act. Neither the corporation nor its officers can do any act or make any contract, or incur any liability, not either expressly or impliedly authorized thereby, or by some legislative act applicable thereto. Much less can any power be exercised, or any act done, which is prohibited by the charter or statute. These principles are of the highest importance in the consideration of the powers, duties and liabilities of municipal corporations.[1]

§ 9. **Construction of corporate powers.**—The rule of construction of grants by the legislature to corporations, whether public or private, is that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.[2]

The action of municipal corporations is to be held strictly within the limits prescribed by statute. Within these limits, however, they are to be favored by the courts, and powers ex-

v. Appleton, 24 Wis. 542; People *v.* R. R. Co., 12 Mich. 389; City of Ogden *v.* Bear Lake, etc., Co., — Utah —, 52 Pac. R. 697; 1 Dill. on Munic. Corp., § 89.

[1] McCann *v.* Otoe Co., 9 Neb. 324; Stewart *v.* Otoe Co., 2 Neb. 177; Sioux City, etc., R. R. Co. *v.* Washington Co., 3 Neb. 42; Fulton *v.* City of Lincoln, 9 Neb. 358; City of Somerville *v.* Dickerman, 127 Mass. 272; Harvard College *v.* Boston, 104 Mass. 470; People *v.* Weber, 89 Ill. 347; City of Bryan *v.* Paige, 51 Tex. 532; Francis *v.* City of Troy, 74 N. Y. 338; State *v.* Marian Co., 21 Kan. 419; City of Kansas *v.* Flannagan, 69 Mo. 22; Bentley *v.* Commissioners, 25 Minn. 259; Reis *v.* Graff, 51 Cal. 86; City of Bridgeport *v.* R. R. Co., 15 Conn. 475; Union Pac. Ry. Co. *v.* Cheyenne, 113 U. S. 516; Town of Leesburg *v.* Putnam, — Ga. —, 29 S. E. R. 602; Keen *v.* Mayor, — Ga. —, 29 S. E. R. 42.

[2] Minturn *v.* Larue, 23 How. 435; Coosaw Mining Co. *v.* South Carolina, 144 U. S. 550, 12 Sup. Ct. R. 689; Stein *v.* Bienville Water Co., 141 U. S. 67; Douglass *v.* Placerville, 18 Cal. 643; Commonwealth *v.* Erie, etc., R. Co., 27 Pa. St. 339; Argenti *v.* City of San Francisco, 16 Cal. 255; Wallace *v.* San Jose, 29 Cal. 180; 1 Elliott R. R., § 38; 3 Elliott R. R., § 1080.

pressly granted, or necessarily implied, are not to be defeated or impaired by strict construction.[1]

Judge Dillon lays down the rule to be, "That while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the state or general public, and against the state's grantee. The rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipal and public bodies which are out of the usual range, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property, or, as it may be compendiously expressed, any common law right of the citizen or inhabitant."[2]

§ 10. **Mode of exercising corporate powers.**—The powers of municipal corporations can be exercised only in conformity with the provisions of its charter or incorporating act. The legislature is invested with the power to impose such restrictions and limitations as it deems proper, and where the mode of exercising the powers is prescribed in the charter or incorporating act that mode must be strictly followed. Thus, in Indiana the supreme court held that when the legislature says a thing must be done in a particular manner it can not be done in a different manner; and this is especially true where there are negative words that in effect prohibit the doing of the thing unless it is done in the manner prescribed.[3]

[1] Willard *v.* Killingworth, 8 Conn. 247; Smith *v.* Madison, 7 Ind. 86; Kyle *v.* Malin, 8 Ind. 34; Bank *v.* Chillicothe, 7 Ohio, 2d pt., 31; Collins *v.* Hatch, 18 Ohio 523; City of Port Huron *v.* McCall, 46 Mich. 565; Leonard *v.* Canton, 35 Miss. 189; City of Lafayette *v.* Cox, 5 Ind. 38.

[2] 1 Dillon on Munic. Corp., § 91; *In re* Jones, 78 Ala. 419; Grand Rapids Electric, etc., Co. *v.* Grand Rapids Edison, etc., 33 Fed. R. 659; Bush *v.* Dubuque, 69 Iowa 233.

[3] First Presbyterian Church *v.* Fort Wayne, 36 Ind. 338, 10 Am. Rep. 35; Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Murphy *v.* Louisville, 9 Bush (Ky.) 189; Tukey *v.* City of Omaha, — Neb. —, 74 N. W. R. 613; Gilman *v.* Milwaukee, 61 Wis. 588; Connor *v.* City of Paris, 87 Tex. 32, 27 S. W. R. 88, 92, citing Elliott on Roads and Streets, 372.

Where no method is prescribed by the charter or statute in which a municipality shall exercise its powers, and it is free to determine the method for itself, it is generally held that it may act either by resolution or ordinance.[1] Bonds issued by a municipal corporation under the corporate seal but without the passage of a resolution authorizing the issue have been declared void where the legislature required the issue at such time or times as the board of trustees may, by resolution, direct.[2]

It has been held, however, that where the power to perform an act is in a municipal corporation and the mode of exercising that power is not followed as prescribed by law, the corporation has the power to subsequently ratify and confirm the informal act or defect so as to make it as binding as if originally done in the proper manner.[3] Thus where it was proposed to pay for an electric light plant by the issue and sale of city bonds and the statute empowered the city to erect such a plant upon the approval of a majority of the voters of the city, it was held proper to submit to a vote the entire matter of erecting the plant and issuing the bonds in one proposition, and that notwithstanding the issuance of the bonds at the time they were authorized by vote would have been in violation of the constitutional limitation as to the amount of municipal indebtedness that could be created, yet if when they were issued they were not in excess, they are not void, no debt being created until the bonds are issued. It was also held that the fact that such bonds were sold and delivered before the ordinance providing for issuing them took effect was no ground for enjoining their payment at the suit of taxpayers.[4]

[1] Glass *v.* Ashbury, 49 Cal. 571; McCoy *v.* Bryant, 53 Cal. 247; Moberry *v.* Jeffersonville, 38 Ind. 198; City of Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. R. 849; Halsey *v.* Rapid Transit Co., 47 N. J. 380, 20 Atl. Rep. 859; State, etc., *v.* Passaic, 44 N. J. L. 171; Green *v.* Cape May, 41 N. J. L. 45. But see City of Waco *v.* Prather, — Tex. Civ. App. —, 35 S. W. R. 958; Newman *v.* City of Emporia, 32 Kan. 456, 4 Pac. R. 815. An ordinance is certainly better and safer.

[2] McCoy *v.* Bryant, 53 Cal. 247.

[3] Holland *v.* San Francisco, 7 Cal. 361.

[4] Thompson Houston Electric Co. *v.* City of Newton, 42 Fed. R. 723.

§ 11. **Delegation of corporate powers.**—The powers conferred upon a municipal corporation in its charter or incorporating act by the legislature are considered a trust to be exercised by it alone, and, therefore, can not be delegated to others. Thus, the supreme court of New Jersey held that the power of the legislature to authorize a municipal body to delegate the police powers, which it has received from the legislature to another *quasi*-municipal body of its creation is void. The court in delivering the opinion used the following language: "The statute in question does not authorize cities possessed of certain police powers to erect excise boards, who, when created, shall *ipso facto* become the transferees of the powers previously possessed by the municipality itself; still less does it confer powers of this nature upon the municipality in the first instance with permission to pass them over to excise boards when created. The act is a grant of original powers to boards of excise commissioners. Until such boards are created there is no person in whom the power can vest. The erection of these boards is entrusted to the governing body of the municipality which creates, but does not delegate."[1]

In Massachusetts the legislature has the constitutional right to authorize the city council to empower the board of police to make rules and regulations concerning the use of the streets of Boston. The court said: "The several towns and cities are agencies of government largely under the control of the legislature. The powers and duties of all the towns and cities, except so far as they are specifically provided for in the constitution, are created and defined by the legislature, and we have no doubt that it has the right, in its discretion, to change the powers and duties created by itself and to vest such powers and duties in officers appointed by the governor, if, in its judgment, the public good requires it, instead of leaving such officers to be elected by the people or appointed by the municipal authorities."[2]

[1] State, etc., Riley *v.* Trenton, 51 N. J. L. 498; Paul *v.* Gloucester Co., 50 N. J. L. 585.

[2] Commonwealth *v.* Plaisted, 148 Mass. 375, 19 N. E. R. 224; Commonwealth *v.* Wooster, 3 Pick. 462; Pedrick *v.* Bailey, 12 Gray 161; Commonwealth *v.* Curtis, 9 Allen 266;

Where a charter or statute requires that local improvements must be assessed upon the abutting property-owners, and are to be made in such a manner as the council shall prescribe by ordinance, it is not proper for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode, manner or plan of such improvement. Such an ordinance is void for the reason that such powers must be exercised in strict conformity with the charter, or incorporating act, and can not be delegated to others.[1]

Where the power to issue licenses is conferred by the charter, or incorporating act, upon the mayor and councilmen, they are constituted to act as one deliberate body to the end that they may assist each other by their united wisdom and experience and the result of their conference to be the ground of their final determination. The city council or board of aldermen can not, even by vote, delegate this power to the mayor alone.[2]

The general principle that municipal corporations can not delegate their powers does not, however, prevent such corporations from appointing agents and empowering them to make contracts or from appointing committees and investing them with the duties of a ministerial or administrative character. Thus where the city council of Galveston had authority to construct sidewalks it had the power to direct the mayor and chairman of the committee on streets and alleys to make a contract on behalf of the city to do the work. The supreme court of the United States in passing upon this question used the following language: "We spend no time in vindicating

Commonwealth *v.* McCafferty, 145 Mass. 384; Welch *v.* Hotchkiss, 39 Conn. 140; Cooley on Const. Lim. 242; 1 Beach on Pub. Corp. 549; 1 Dillon on Munic. Corp. 154; 15 Am. & Eng. Encyc. of Law, 1042.

[1] State *v.* Houser, 63 Ind. 155; State *v.* Bell, 34 Ohio St. 194; Birdsell *v.* Clark, 73 N. Y. 73; City of Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396; Mayor, etc., of Baltimore *v.* Scharf, 54 Md. 499; Ruggles *v.* Collier, 43 Mo. 353; Sheehan *v.* Gleeson, 46 Mo. 100; City of East St. Louis *v.* Wehrung, 50 Ill. 28; Elliott on Roads and Streets, 381.

[2] Day *v.* Green, 4 Cush. 433; Coffin *v.* Nantucket, 5 Cush. 269; Ruggles *v.* Nantucket, 11 Cush. 433; Clark *v.* Washington, 12 Wheat. 40; Northern Central Railway Co. *v.* Baltimore, 21 Md. 93; Winants *v.* Bayonne, 44 N. J. L. 114; State *v.* Patterson, 34 N. J. L. 163; Cooley on Const. Lim. 204.

this proposition. It is true the council could not delegate all the power conferred upon it by the legislature, but like every other corporation it could do its ministerial work by agent. Nothing more was done in this case. The council directed the pavement, ordering them to be constructed of one or the other of several materials, but giving to owners of abutting lots the privilege of selecting which, and reserving to the chairman of the committee authority to select in case the lot owners failed. The council also directed how the preparatory work should be done. There was, therefore, no unlawful delegation of power."[1]

Where a charter commits to the city council by name the entire control of the city's finances, with power to issue and sell bonds, it can not delegate to the mayor authority to sell such bonds at his discretion as to price.[2]

§ 12. **When legislative powers can not be surrendered.**— Closely related to the proposition that legislative powers can not be delegated to others is the proposition that a municipal corporation can not surrender, or divest itself of legislative powers without express or implied authority. Such corporations may authorize contracts, but they have no power to make contracts, or pass by-laws which shall cede away control or embarrass the legislative or governmental powers or which shall in any way disable them from performing their public duties.[3]

In the case of Goszler *v.* Georgetown,[4] Chief Justice Marshall, in delivering the opinion of the court, says: "A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract which

[1] Hitchcock *v.* Galveston, 96 U. S. 341; Hannibal, etc., Railroad Co. *v.* Marion Co., 36 Mo. 294; Schenley *v.* Commonwealth, 36 Pa. St. 62; Stewart *v.* Council Bluffs, 58 Iowa 642; Gregory *v.* Bridgeport, 41 Conn. 76; Bartram *v.* City of Bridgeport, 55 Conn. 122, 10 Atl. R. 470; Elliott on Roads and Streets, 381.

[2] Blair *v.* City of Waco, 75 Fed. R. 800.

[3] Richmond Gas Light Co. *v.* Middleton, 59 N. Y. 228; Lord *v.* Oconto, 47 Wis. 386; Mathews *v.* Alexandria, 68 Mo. 115; City of Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396; Town of East Hartford *v.* Hartford Bridge Co., 10 How. (U. S.) 541; Goszler *v.* Georgetown, 6 Wheat. 593.

[4] Goszler *v.* Georgetown, 6 Wheat. 593.

should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law which the legislature enables it to enact, may well be questioned. We rather think that a corporation can not abridge its own legislative power.'' Thus, the city of Laredo employed an attorney to defend the city's title to a ferry and agreed to give him for a term of years one-third of the receipts of the ferry and of any other neighboring ferry or bridge thereafter to be erected. The agreement bound the city so to conduct the ferry as to get the greatest possible income from it and thus prevented it from making the ferry free or constructing a free bridge and was irrevokable. The supreme court of Texas in passing upon this question held that the agreement was void as it divested the city of that legislative power conferred upon it by law to be exercised in its discretion whenever it may become necessary, and, therefore, could not be surrendered or bargained away.[1]

§ 13. **Judicial control of legislative powers considered.**— The discretion of municipal corporations within the scope of their corporate power is as broad as that possessed by the government of a state. This discretion is to be exercised according to the judgment of the corporation as to the necessity or expediency of any given measure. The general assembly is a co-ordinate branch of the state government and so is the law-making power of municipal corporations within the limits prescribed by its charter or incorporating act. It is no more the province of the judiciary to interfere with the legitimate legislative acts of the one than the other. Thus where municipal corporations, or their duly authorized officers are acting within a well recognized power or exercising a discretionary power the courts are wholly unwarranted in interfering, unless

[1] Waterbury *v.* Laredo, 68 Tex. 565, 20 Am. & Eng. Corp. Cases 186; Johnson *v.* Philadelphia, 60 Pa. St. 445; Karst *v.* St. Paul, etc., R. R. Co., 22 Minn. 118; Peru *v.* Gleason, 91 Ind. 566; Roberts *v.* Chicago, 26 Ill. 249; Murphy *v.* Chicago, 29 Ill. 279, 81 Am. Dec. 307; City of Quincy *v.* Jones, 76 Ill. 231, 20 Am. R. 243; White *v.* Yazoo City, 27 Miss. 357; Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. R. 80; Oakland *v.* Carpenter, 13 Cal. 540; Roll *v.* Augusta, 34 Ga. 326; Cooley on Const. Lim. 206.

fraud is shown, or unless there is a manifest abuse of discretion to the oppression of the citizens.[1]

Where a municipal corporation having power to construct public buildings, but forbidden by positive law to raise money or loan its credit in aid of a private corporation, passes an ordinance providing for contracting with a railroad company for the erection of public buildings, a court can not interfere on the ground that the real object of the ordinance is to aid the railroad.[2]

In Illinois it is held that a city has a large discretion as to the opening, grading and repairing of streets in respect to the time, manner and cost of the same, and in respect to such power can not be controlled by the courts unless there is a great abuse of power operating upon the citizens.[3]

In Ohio, where a municipal corporation is entrusted with the execution of a power and is not confined to a particular mode, but has a discretion and choice of means, a plain case of abuse must be shown resulting in an injury to the petitioner to warrant an injunction against the corporation.[4]

In general, the principle obtains that this discretionary power, where it is conferred or exists, can not be judicially interfered with or brought into question, except when the power is clearly exceeded, or where fraud is shown or imputed, or where there is a manifest invasion of private rights. Thus

[1] City of St. Louis *v.* Boffinger, 19 Mo. 15; Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. R. 756; Kelley *v.* Milwaukee, 18 Wis. 83; Brusn *v.* Carbondale, 78 Ill. 74; Dodd *v.* Hartford, 25 Conn. 232; Spaulding *v.* Lowell, 23 Pick. (Mass.) 71; Evansville R. R. Co. *v.* Evansville, 15 Ind. 395; Valparaiso *v.* Gardner, 97 Ind. 1, 49 Am. Rep. 416; Danielly *v.* Cabaniss, 52 Ga. 211; Satterthwaite *v.* Beaufort Co., 76 N. C. 153; Holland *v.* Baltimore, 11 Md. 186; Mayor, etc., of Baltimore *v.* Gill, 31 Md. 375; Lockwood *v.* St. Louis, 24 Mo. 20; Sheidley *v.* Lynch, 95 Mo. 487, 24 Am. & Eng. Corp. Cases 520; Mayor of Brooklyn *v.* Meserole, 26 Wend. (N. Y.) 132; Markle *v.* Akron, 14 Ohio 192; Cincinnati *v.* Gwynne, 10 Ohio 192; Horton, etc., *v.* Mayor of Nashville, 4 Lea (Tenn.) 39, 1 Am. R. 1; City of Oil City *v.* Oil City Works, 152 Pa. St. 348, 25 Atl. R. 549; Motz *v.* Detroit, 18 Mich. 495; 2 Beach Pub. Corp., § 1112.

[2] Coulson *v.* Portland, 1 Deady (C. C.) 481.

[3] Brush *v.* Carbondale, 78 Ill. 74; Louisville, etc., R. Co. *v.* City of East St. Louis, 134 Ill. 656, 25 N. E. R. 962. So in Indiana. Leeds *v.* City of Richmond, 102 Ind. 372; City of Kokomo *v.* Mahan, 100 Ind. 242.

[4] Markle *v.* Akron, 14 Ohio 586; Cincinnati *v.* Gwynne, 10 Ohio 192.

where the law or charter confers upon the city council or board of aldermen the power to determine the expediency or necessity of measures relating to local government, their judgment upon matters thus committed to them while acting within the scope of their authority can not be superseded or controlled by the courts. The use of the revenue of a city in excess of that set apart by law for the payment of interest on its bonded debt and for a sinking fund is within the discretion of the municipal authorities and the court will not interfere by mandamus to require a part of it to be applied to the payment of a judgment before there is an ascertained surplus over expenditures.[1]

§ 14. **When discretionary powers not subject to judicial control.**—The power to do an act is often conferred upon a municipal corporation in general terms without any prescribed mode or manner in which such power shall be exercised. In such cases the common council, or governing body necessarily have, to a greater or less extent, a discretion as to the manner in which those powers shall be exercised. Thus, if a city has power to grade streets the court will not inquire into the necessity of the exercise by it, or the refusal to exercise it, nor whether a particular grade adopted, or particular mode of executing the grade is judicious or the best plan.[2]

Where a municipal corporation is entrusted with the execution of a power and is not confined to a particular mode, but has a discretion in the choice of means, a plain case of abuse must be shown resulting in an injury to the party before an injunction will lie against the municipality.[3]

[1] East St. Louis *v.* Zebley, 110 U. S. 321; Baker *v.* Boston, 12 Pick. 184; Hovey *v.* Mayo, 43 Me. 322; Sheridan *v.* Colvin, 78 Ill. 237; Droze *v.* Parish of East Baton Rouge, 36 La. Ann. 307; United States *v.* New Orleans, 31 Fed. R. 537; Torrent *v.* Muskegon, 47 Mich. 115; Moses *v.* Risdon, 46 Iowa 251.

[2] Hovey *v.* Mayo Street Comr., 43 Me. 322; Benjamin *v.* Wheeler, 8 Gray (Mass.) 409; Richmond *v.* McGirr, 78 Ind. 192; Elliott on Roads and Streets, 351, 375, 413.

[3] Page *v.* St. Louis, 24 Mo. 136; Colton *v.* Hanchett, 13 Ill. 615; Bush *v.* Carbondale, 78 Ill. 74; Mayor of Baltimore *v.* Gill, 31 Md. 375; Dodd

In questions involving the legislative functions of municipalities the courts are bound to presume that they will exercise any discretion with which they are clothed properly and that they have sufficient reasons for doing an act the result of such discretion.[1]

Where a city has, under the statute, power to build a market house the courts can not inquire into the size and fitness of the building for the object intended.[2]

Where, by its charter, a city is empowered, if it deems the public welfare or convenience requires it, to open streets, or make public improvements thereon, its determination whether wise or unwise can not be judicially revised or corrected.[3] In other words the courts will not interfere with the legislative functions of municipal corporations in the administration of their local government unless they are acting beyond their scope of power or clearly invade some private right or are guilty of gross abuse of discretion.

§ 15. **Mandatory and discretionary powers distinguished.**— It is often important and material to determine whether a duty imposed by law or charter upon a municipal corporation or public officers is mandatory or discretionary. Whether the powers conferred upon a municipal corporation or its officers are discretionary or mandatory is a question of legislative intent. What a municipal corporation is empowered to do for others and that which is beneficial to them or to the public to have done the law holds they ought to do, especially if the law specifically or adequately supplies them with the means of carrying out such powers. The power in such cases is conferred for the benefit of others or of the public, and the intent of the legislature, which is the test in all such cases, ordinarily seems, under such circumstances, to impose an absolute and positive duty. Where the act to be done does not affect third

v. Hartford, 25 Conn. 232; Lockwood *v.* St. Louis, 24 Mo. 20; Union Pacific Railway Co. *v.* Cheyenne, 113 U. S. 516.

[1] New York, etc., R. Co. *v.* Mayor of New York, 1 Hilton 562; Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505.

[2] Spaulding *v.* Lowell, 23 Pick. 71.

[3] Methodist E. Church *v.* Baltimore, 6 Gill (Md.) 391; Wiggin *v.* Mayor of New York, 9 Paige 16.

parties and is not clearly beneficial to them or the public, and the means for performance are inadequate, the words "may" do an act or it is "lawful" to do it do not mean "must," but rather indicate an intent on the part of the legislature to confer discretionary power.[1]

Thus, in Pennsylvania, an act of the legislative assembly authorized the city of Erie to make a sufficient number of reservoirs to supply water in case of fire. The council constructed the reservoirs, but allowed one to become dilapidated and out of repair, so that it would not hold water. A fire occurred near this reservoir and certain buildings were destroyed. The owner of the buildings brought suit against the city for damages, alleging negligence on the part of the city. The supreme court, in passing upon the question, held that it was a discretionary power for the city to construct the reservoirs, and, therefore, it was not liable under the circumstances.[2]

In Illinois, where an act authorized the city of Ottawa to erect two bridges across the Illinois and Michigan canal, upon condition that when constructed the bridges should be maintained, repaired and open for passage for boats by the city, the supreme court held that, by this language, an imperative duty was imposed upon the city to maintain and keep in repair and open and close those bridges for passage of boats and travelers by land and to compel the performance of such a duty, a proceeding in mandamus would lie against the city officers.[3]

Where a municipal corporation or governing body is clothed by statute with power to do an act which concerns the public interests, or the rights of third persons, the execution of power may generally be insisted upon as a duty, though the statute creating that duty may be only permissive in its terms. The

[1] Mason *v.* Fearson, 9 How. (U. S.) 248; Hurford *v.* Omaha, 4 Neb. 336; Veazie *v.* China, 50 Me. 518; Leavenworth, etc., Railroad Co. *v.* Platte Co., 42 Mo. 171; Grant *v.* Erie, 69 Pa. St. 420, 8 Am. R. 272; Goodrich *v.* Chicago, 20 Ill. 445; Ottawa *v.* People, 48 Ill. 233.

[2] Grant *v.* City of Erie, 69 Pa. St. 420; Carr *v.* North Liberties, 35 Pa. St. 324, 78 Am. Dec. 342.

[3] City of Ottawa *v.* People, 48 Ill. 233; Goodrich *v.* City of Chicago, 20 Ill. 445; Coopers *v.* San Jose, 55 Cal. 599.

word "may" when used in the statute conferring powers of this nature is frequently construed as synonymous with "shall" and "must."[1]

§ 16. **Extent of legislative control over municipal corporations.**—Municipal corporations are established for the local government of municipalities of a particular district. The special powers conferred upon them are not vested rights against the state, but being wholly political exist only during the will of the general legislature, otherwise there would be numberless petty governments existing within a state and forming a part of it, but independent of the control of the sovereign power.[2] Thus the state of Maryland, in 1836, passed a law directing a subscription of $3,000,000 to be made to the capital stock of the Baltimore and Ohio Railroad Company with the following provision: "That if the said company shall not locate the said road in the manner provided for in this act, then, in that case, they shall forfeit $1,000,000 to the state of Maryland for the use of Washington county." In March, 1841, the state passed another act repealing so much of the prior act as made it the duty of the company to construct the road by the route therein prescribed, remitting and releasing the penalty, and directing the discontinuance of any suit brought to recover the same. It was held by the supreme court of the United States that the proviso was a measure of the state policy, which it had the right to change, if the policy was afterwards discovered to be erroneous, and neither the commissioners, nor the county, nor any of its citizens acquired any separate interest under it, which could be maintained in a court of justice.[3]

Municipal corporations are liable to have their public pow-

[1] Mayor, etc., of New York *v.* Furze, 3 Hill (N. Y.) 612; Springfield Milling Co. *v.* Lane Co., 5 Ore. 265; Phelps *v.* Hawley, 52 N. Y. 23; Blake *v.* Portsmouth, etc., R. R. Co., 39 N. H. 435; City of Indianapolis *v.* McAvoy, 86 Ind. 587; Supervisors *v.* United States, 4 Wall. 435; State, *ex rel.*, *v.* Board, 36 Wis. 498.

[2] Sloan *v.* State, 8 Blackf. (Ind.) 361; People *v.* Morris, 13 Wend. 325; Armstrong *v.* Board, etc., 4 Blackf. (Ind.) 208.

[3] State *v.* R. R. Co., 3 How. (U. S.) 534; United States *v.* Railroad Co., 17 Wall. 322; Chicago, etc., Railroad Co. *v.* Adler, 56 Ill. 344.

ers, rights and duties modified or abolished at any time by the legislature. They are allowed to hold privileges and property only for public purposes. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than contracts.[1] The powers, therefore, conferred upon municipal corporations may at any time be altered or repealed by the legislature, either by a general law operating upon the whole state, or, in the absence of a constitutional restriction, by a special act.[2]

§ 17. **Power to pass general and special laws.**—The constitutions of Kansas, Illinois, Indiana, Missouri, Texas, California, Alabama, and several other states, provide that no special or local law shall be passed when a general law can be made applicable. Under such constitutional provisions the courts, as a rule, have held that it is a question for the legislature, exclusively, whether a general law can not be made applicable in a certain case.[3] But where there is an abuse of legislative discretion it has been held that the courts will intervene.[4]

In several of the states there are constitutional provisions absolutely prohibiting the legislature from passing any private or special law governing municipalities.[5]

[1] Town of East Hartford *v.* Hartford Bridge Co., 10 How. (U. S.) 511.

[2] Meriwether *v.* Garrett, 102 U. S. 472; Girard *v.* Philadelphia, 7 Wall. 1; City of Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396; Crook *v.* People, 106 Ill. 237; Churchill *v.* Walker, 68 Ga. 681; People *v.*, Jobs, 7 Colo. 475; Wiley *v.* Bluffton, 111 Ind. 152; City of Reading *v.* Keppleman, 61 Pa. St. 233; Demarest *v.* New York, 74 N. Y. 161; Rose *v.* Hardie, 98 N. Car. 44; Broughton *v.* Pensacola, 93 U. S. 266.

[3] Board, etc., of St. Louis *v.* Shields, 62 Mo. 247; State *v.* Robbins, 51 Mo. 82; State *v.* Boone Co., 50 Mo. 317; Johnson *v.* Railroad Company, 23 Ill. 124; State *v.* Hitchcock, 1 Kan. 178; Wiley *v.* Bluffton, 111 Ind. 152; Gentile *v.* State, 29 Ind. 409; Marks *v.* Purdue University, 37 Ind. 155; City of Evansville *v.* State, 118 Ind. 426; State *v.* Tucker, 46 Ind. 355; Board *v.* Brown, 147 Ind. 476; Carpenter *v.* People, 8 Colo. 426; Brown *v.* Denver, 7 Colo. 205; Murdock *v.* Woodson, 2 Dillon (C. C.) 188; Richman *v.* Board, 77 Iowa 513, 42 N. W. R. 422; Darling *v.* Rogers, 7 Kan. 592. But there is considerable conflict among the authorities. See Cooley's Const. Lim. 152, *et seq.*; 1 Dillon's Munic. Corp., §§ 45-49.

[4] Carpenter *v.* People, 8 Colo. 116; State *v.* Boone Co., 50 Mo. 317; Longworth *v.* Evansville, 32 Ind. 322. See, also, Morrison *v.* Springer, 15 Iowa 304; Stewart *v.* Board, 30 Iowa 9.

[5] Carpenter *v.* People, 8 Colo. 116;

The legislature of Illinois passed a general law for the incorporation of cities, towns and villages, and a subsequent law purporting to authorize the city council of any incorporated city to adopt a different mode of assessment and collection of city taxes than that prescribed by the general law on the subject was declared to be local and special legislation, and, therefore, unconstitutional and void.[1]

A statute purporting to confer upon all cities having a population of not less than twenty-five thousand inhabitants the power of issuing bonds to fund the floating debt has been held to be a special law, and in violation of the constitutional amendment which forbids the passing of special laws to regulate the internal affairs of municipalities.[2]

An act legalizing a special election held in a single city and authorizing such city to issue bonds in aid of a specified manufacturing enterprise is a special act, and one which confers corporate powers within the meaning and contrary to the prohibition of article 12 of the Kansas constitution, and, therefore, is unconstitutional and void.[3]

§ 18. **General extent and power to contract.**—The power of municipal corporations to make contracts is generally conferred in the charter or general incorporating act. And where the power is conferred in this manner, it is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary and appropriate to enable the corporation to secure or carry out the purposes for which it was instituted. The extent of the power will depend upon other provisions of the charter prescribing the matters in respect to which the corporation is empowered to act. But to the extent necessary to execute the special powers and functions for

State *v.* Parsons, 40 N. J. L. 123. See, also, School Dist. *v.* Insurance Co., 103 U. S. 707; 1 Dillon's Munic. Corp., § 45. So, in some of the states in which the legislature may pass a special law, on most subjects, where they deem that a general law can not be made applicable, there are certain specified matters in regard to which the constitution forbids a special law.

[1] People *v.* Cooper, 83 Ill. 585.

[2] State, *ex rel.* Anderson, *v.* Trenton, 42 N. J. L. 486.

[3] Commercial National Bank *v.* Icla, 2 Dillon (C. C.) 353.

which it was instituted, there necessarily must be an implied or incidental authority to contract and incur obligations in the name of the corporation, and hence, a municipal corporation, like a trading or business corporation, may, to that extent, unless restrained in some way by its charter or organic law, enter into any contract necessary to enable it to carry out the powers conferred upon it.[1]

§ 19. **Implied contracts of municipal corporations.**—As a general proposition of law municipal corporations are only liable upon express contracts, duly authorized by charter or fundamental law conferred upon them. But there are exceptions to this general proposition. These exceptions relate to liabilities for the use of money or other property which does not belong to the municipality, and to liabilities arising from the neglect of duties, prescribed by the charter or organic law, from which injuries to persons or property necessarily result. Municipal corporations, therefore, like private or trading corporations may be liable upon implied contracts within the scope of their powers. Chancellor Kent said: "Corporations may be bound by implied contracts within the scope of their powers, to be deduced by inference, from authorized corporate acts without either a vote, or deed or writing."[2]

An implied promise or contract can not, however, be raised

[1] 2 Kent Com., 224; City of Galena *v.* Corwith, 48 Ill. 423; Straus *v.* Eagle Insurance Co., 5 Ohio St. 59; Chaffee *v.* Granger, 6 Mich. 51; Douglass *v.* Virginia City, 5 Nev. 147; Goodrich *v.* Detroit, 12 Mich. 279; Bank of Columbia *v.* Patterson, 7 Cranch (U. S.) 299; Montgomery Co. *v.* Barber, 45 Ala. 237; City of Williamsport *v.* Commonwealth, 84 Pa. St. 487; Rome *v.* Cabot, 28 Ga. 50; City of Lawrence *v.* Killian, 11 Kan. 499; City of Wyandotte *v.* Zeitz, 21 Kan. 649; City of Brenham *v.* Brenham Water Co., 67 Tex. 542; Sturtevants *v.* Alton, 3 McLean 393; Gregory *v.* Bridgeport, 41 Conn. 76, 19 Am. R. 458; State *v.* Hammonton, 38 N. J. L. 430; Argenti *v.* San Francisco, 16 Cal. 255; Pullman *v.* Mayor of New York, 54 Barb. (N. Y.) 169.

[2] 2 Kent Com., 291; Bank of Columbia *v.* Patterson, 7 Cranch (U. S.) 299; Mott *v.* Hicks, 1 Cow. (N. Y.) 513; Bank of United States *v.* Danbridge, 12 Wheat. 64; City of Davenport *v.* Peoria Ins. Co., 17 Iowa 276; Wayne Co. *v.* Detroit, 17 Mich. 390; Adams *v.* Fannsworth, 15 Gray (Mass.) 423; Peterson *v.* Mayor of New York, 17 N. Y. 449; Maher *v.* Chicago, 38 Ill. 266; City of Bryan *v.* Page, 51 Tex. 532; Nurnberger *v.* Town of Barnwell, 42 S. Car. 158, 20 S. E. R. 14; State Board *v.* Aberdeen, 56 Miss. 518; 2 Beach Mod. Cont., § 1140.

against a corporation where, by its charter or organic act it is authorized to contract only in a prescribed manner, unless it be a promise for money received or property converted under the contract.[1]

§ 20. **Mode of contracting.**—When the mode of proceeding in relation to municipal contracts is prescribed by law, or in the charter of the corporation, such mode must be strictly followed by the corporation, in making contracts or by their subsequent ratification. The party dealing with a municipal body is bound to know that all the mandatory provisions of the law are complied with and if he fails or neglects to take such precautions he becomes a mere volunteer and must suffer the consequences.[2]

This general principle, however, applies with full force only where the charter or statutory provisions are mandatory and not discretionary. Thus, where the charter directed the mode in which money should be drawn from the treasury to be by an order of the council signed by the mayor, such an order issued upon a memorandum in the minutes of the corporation without a formal order being entered was adjudged a sufficient compliance with the charter.[3] But where a charter limits the exercise of power, the mayor and council can not in a different mode make a valid contract, nor can they, by any subsequent approval or conduct, impart validity to such contract, nor would

[1] McSpedon *v.* Mayor of New York, 7 Bosw. (N. Y.) 601; McCracken *v.* San Francisco, 16 Cal. 591; Pimental *v.* San Francisco, 21 Cal. 351; Dickinson *v.* Poughkeepsie, 75 N. Y. 65; Richardson *v.* Grant Co., 27 Fed. R. 495; Argenti *v.* San Francisco, 16 Cal. 255.

[2] People *v.* Weber, 89 Ill. 347; City of Bryan *v.* Paige, 51 Tex. 532; State *v.* Marion Co., 21 Kan. 419; City of Kansas *v.* Flannagan, 69 Mo. 22; Dore *v.* Milwaukee, 42 Wis. 108; Butler *v.* Nevin, 88 Ill. 575; Bentley *v.* County Comrs., 25 Minn. 259; Fulton *v.* Lincoln, 9 Neb. 358; Hurford *v.* Omaha, 4 Neb. 336; Addis *v.* Pittsburg, 85 Pa. St. 379; Leavenworth *v.* Rankin, 2 Kan. 357; McCoy *v.* Briant, 53 Cal. 247; City of Terre Haute *v.* Lake, 43 Ind. 480; Los Angeles Gas Co. *v.* Toberman, 61 Cal. 199. See, also, Arnott *v.* City of Spokane, 6 Wash. 442, 33 Pac. R. 1063; 2 Beach Mod. Cont., § 1136.

[3] Kelley *v.* Mayor of Brooklyn, 4 Hill (N. Y.) 263; Maddox *v.* Graham, 2 Met. (Ky.) 56; Starkey *v.* Minneapolis, 19 Minn. 203.

the law imply any such contract; the law never implies an obligation to do that which it forbids the party to agree to do.[1]

A contract with a municipal corporation, which by its terms is not to be and can not be performed within one year from the making thereof, is within the statute of frauds; but an entry in the proceedings of the city council of a resolution expressing the terms of the contract, signed by the clerk, constitutes a note or memorandum in writing sufficient to take the case out of the statute and to bind the corporation.[2]

Where the statute provides that all contracts of municipal corporations shall be in writing, this provision must be observed or the contract will be invalid; but unless there is some such provisions in the statute or charter, there is nothing to prevent a municipal corporation from contracting by parol by its duly authorized officers or agents. The common law doctrine that corporations could not bind themselves by a contract not under seal no longer obtains in this country, unless so required by statute or by the charter of the city. A resolution or ordinance may bind the corporation as a contract, when so intended, in matters not required to be attested in some different form, but a resolution approving a contract, which the statute of frauds requires to be in writing and signed, does not constitute a signing.[3]

In general a municipal corporation may contract by ordinance or resolution and an ordinance accepting the terms of a proposition made to the municipality amounts to an assent to the contract on the part of the corporation and not a mere declaration of intention to enter into a contract.[4]

[1] City of Bryan *v.* Page, 51 Tex. 532; Francis *v.* Troy, 74 N. Y. 338. See, also, Nelson *v.* Mayor, etc., of New York, 131 N. Y. 4; Newport *v.* Batesville R. R. Co., 58 Ark. 270, 24 S. W. R. 427.

[2] Argus Co. *v.* Albany, 55 N. Y. 495; Duncombe *v.* The City of Fort Dodge, 38 Iowa 281.

[3] Wade *v.* Newburn, 77 N. Car. 460. See, also, Carskaddon *v.* South Bend, 141 Ind. 596, 39 N. E. R. 667.

[4] People *v.* Board of Supervisors, 27 Cal. 655; City of Sacramento *v.* Kirk, 7 Cal. 419; Bellmeyer *v.* Marshalltown, 44 Iowa 564; Ross *v.* Madison, 1 Ind. 281; City of Logansport *v.* Blakemore, 17 Ind. 318; Clark *v.* Washington, 12 Wheat. (U. S.) 40; City of Detroit *v.* Jackson, 1 Doug. 106. See, also, Brady *v.* Bayonne, 28 N. J. 379, 30 Atl. R. 968.

In Iowa the supreme court held that a municipal corporation may contract by parol by its agents, notwithstanding a statute which clearly defines how the order to contract shall be made and evidenced, when directed by the council, and that such statute is not a limitation on its power to contract otherwise.[1]

§ 21. **Contracts with municipal officers and agents.**—Persons contracting with a municipal corporation must, at their peril, inquire into the powers of the corporation or its officers and agents to make contracts, and any contract beyond the scope of corporate power is void, although it be under the seal of the corporation.[2] Thus it has been held that the officers and agents of a municipal corporation can not bind the corporation by any act which transcends their lawful or legitimate powers, and that this rule applies to the issue of negotiable as well as non-negotiable evidence of debt.[3]

The rule is firmly established that municipal corporations may, by their officers and duly authorized agents, make contracts the same as individuals and other corporations in matters that relate to the municipality and are within the scope of their powers. However, it seems that municipal officers and their agents are limited more strictly within the prescibed powers than officers and agents of private concerns, and there are many cases in which it has been held that a contract made by the agent of a municipal corporation did not bind the principal in the absence of authority.[4]

[1] City of Indianola *v.* Jones, 29 Iowa 282.

[2] Marsh *v.* Fulton Co., 10 Wall. 676; Lovejoy *v.* Inhabitants (Me.), 40 Atl. R. 141; City of Leavenworth *v.* Rankin, 2 Kan. 357; McAleer *v.* Angell, 19 R. I. 688, 36 Atl. R. 588; Clements *v.* Lee, 114 Ind. 397, 16 N. E. R. 799; Boston, etc., Co. *v.* Cambridge, 163 Mass. 64, 39 N. E. R. 787; Davies *v.* Mayor, 93 N. Y. 250; Turney *v.* Town of Bridgeport, 55 Conn. 412, 12 Atl. R. 520; Beach Pub. Corp., § 217. There is however, conflict among the authorities and this subject will be more fully considered hereafter.

[3] Clark *v.* City of Des Moines, 19 Iowa 199.

[4] Louisville City R. Co. *v.* Louisville, 8 Bush (Ky.) 415; Parsel *v.* Barnes, 25 Ark. 261; Mayor, etc., of Baltimore *v.* Musgrave, 48 Md. 272; City of Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. R. 601; Regents, etc., *v.* Detroit, 12 Mich. 138; Bank of Metropolis *v.* Guttschlicks, 14 Pet. 19; Bank of Columbia *v.* Patterson, 7 Cranch 299; Lyon *v.* Adamson, 7 Iowa 509; Blanch-

§ 22. **Limitations upon the power to contract.**—It is customary in granting municipal charters or general acts for the incorporation of municipalities to prescribe their powers and define their duties ; and the authority to enter into contracts which are necessary and proper to carry into effect their powers and discharge their duties is impliedly given to such corporations, but this implied authority is only co-extensive with the powers and duties of the corporation; and if any greater authority is claimed, it must be found in an express or special grant from the legislature. It is, however, settled beyond all question that no contract can be made by a corporation which is prohibited by its charter or by statute.[1]

While a contract made by a municipal corporation in violation of an express provision in its charter or fundamental law is void, yet in the absence of special legislative restriction, the municipal authorities, who have exceeded its power in the form of the contract, may execute a new contract in any proper form and purge the transaction of its illegality.[2]

Thus, where a city borrowed money of a bank upon its note at usurious interest, and the bank had subsequently canceled the illegal note, and refunded the excessive interest and received a new note for a lawful amount, the court held that the new note was valid.[3]

§ 23. **Contracts ultra vires not binding.**—The powers and duties of the officers and agents of municipal corporations are prescribed by statute and every person dealing with them is charged with the knowledge of the nature of these duties and the

ard *v.* Blackstone, 102 Mass. 343; Stanton *v.* Camp, 4 Barb. (N. Y.) 274; Goodrich *v.* City of Waterville, 88 Me. 39, 33 Atl. R. 659; Story on Agency, §§ 154, 260, 276. See, also, 2 Beach Mod. Cont., §§ 1136, 1149.

[1] Mayor, etc., of Jackson *v.* Bowen, 39 Miss. 671; Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396; Thomas *v.* Richmond, 12 Wall. 349; Morgan *v.* Menzies, 60 Cal. 341.

[2] Little Rock *v.* Merchants' National Bank, 98 U. S. 308, 5 Dillon 299; Hitchcock *v.* Galveston, 96 U. S. 341; Mayor of Nashville *v.* Ray, 19 Wall. 468; Police Jury *v.* Britton, 15 Wall. 566; Mullarky *v.* Cedar Falls, 19 Iowa 21; Sykes *v.* Lafferty, 27 Ark. 407; Wright *v.* Hughes, 13 Ind. 109.

[3] Miller *v.* Hull, 4 Denio (N. Y.) 104; Kent *v.* Walton, 7 Wend. (N.Y.) 256; Washburn *v.* Franklin, 35 Barb. (N. Y.) 599.

extent of the corporate powers.[1] And it has often been held that a municipal corporation may set up, as a defense, the plea of *ultra vires* or its want of power under its charter or incorporating act to enter into a given contract or to do a given act in excess of its corporate power and authority.[2]

But it is held in a recent case, that a county board may lawfully employ counsel to test the validity of bonds issued by the county, and for this purpose may agree with counsel to test the validity of a tax levied to pay interest on such bonds, by aiding a tax-payer in resisting application for judgment against him for such tax. While the board may not employ counsel solely for the purpose of aiding a tax-payer in his private litigation, yet when the purpose of the litigation is to test the validity of the tax for the benefit of the public, it may employ counsel for that purpose, and it will be liable to pay for the legal services performed by the attorneys at law so employed

[1] Waters *v.* Trovillo, 47 Kan. 197, 27 Pac. R. 822; Lovejoy *v.* Inhabitants (Me.), 40 Atl. R. 141; Clough *v.* Hart, 8 Kan. 487; Morrill *v.* Douglass, 14 Kan. 294; Fort Wayne *v.* Lehr, 88 Ind. 62; Travelers' Ins. Co. *v.* Oswego, 55 Fed. R. 361; Cowdrey *v.* Caneadea, 16 Fed. R. 532; Clark *v.* Des Moines, 19 Iowa 199; Abbott *v.* Town of North Andover, 145 Mass. 484, 14 N. E. R. 754; McDonald *v.* Mayor of New York, 68 N. Y. 23, 23 Am. R. 144; Brown *v.* Bon Homme Co., 46 N. W. R. 173; Merchants' Bank *v.* Bergen Co., 115 U. S. 384; Bissell *v.* Spring Valley Township, 110 U. S. 162; Sutro *v.* Pettit, 74 Cal. 332, 5 Am. St. R. 442; Schumm *v.* Seymour, 24 N. J. Eq. 143; Union, etc., Township *v.* First National Bank, 102 Ind. 464; Pugh *v.* Little Rock, 35 Ark. 75; Bloomington School Tp. *v.* National School Furnishing Co., 107 Ind. 43; Axt *v.* Jackson School Tp., 90 Ind. 101; City of Indianapolis *v.* Wann, 144 Ind. 175, 188; Johnson *v.* Common Council of Indianapolis, 16 Ind. 227; City of Cleveland *v.* State Bank of Ohio, 16 Ohio St. 236, 88 Am. Dec. 445.

[2] Stidger *v.* Red Oak, 64 Iowa 465; Sioux City *v.* Weare, 59 Iowa 95; Clark *v.* Des Moines, 19 Iowa 199; Mayor of Nashville *v.* Ray, 19 Wall. 468; Whiteside *v.* United States, 93 U. S. 247; Daviess Co. *v.* Dickinson, 117 U. S. 657; Mayor of Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535; Baltimore *v.* Musgrave, 48 Md. 272; Cheeney *v.* Brookfield, 60 Mo. 53; Spaulding *v.* Lowell, 23 Pick. 71; Perry *v.* Superior City, 26 Wis. 64; Shipman *v.* State, 43 Wis. 381; Nash *v.* St. Paul, 8 Minn. 172; Newberry *v.* Fox, 37 Minn. 141; Donovan *v.* Mayor of New York, 33 N. Y. 291; Syracuse Water Co. *v.* City of Syracuse, 116 N. Y. 167, 22 N. E. R. 381; Martin *v.* Mayor of Brooklyn, 1 Hill 545; Austin *v.* Coggeshall, 12 R. I. 329.

by it, although the county is not a formal party to the litigation.[1]

§ 24. **Ratification of unauthorized contracts.**—A municipal corporation may ratify the contracts and unauthorized acts of its officers or agents which are within the scope of the corporate powers, but not otherwise. Ratification may frequently be inferred from acquiescence, after knowledge of all the material facts, or from acts inconsistent with any other supposition.[2]

There is, however, an important distinction between an unauthorized contract and contracts that are wholly void. A subsequent ratification of a contract can not make valid an unlawful act beyond the scope of corporate authority. Much the same doctrine applies, according to many of the authorities, where the officers or agents of a corporation fail to pursue the requirements of a mandatory statutory provision under which they are acting. In all such cases the statute must be strictly followed, and a person who deals with a municipal corporation is bound to see that its charter or law under which it acts has been complied with. But, in any event, no subsequent act of the corporation can make an *ultra vires* contract valid.[3]

[1] Franklin Co. *v.* Layman, 145 Ill. 138. See, also, Wiley *v.* Seattle City, 7 Wash. 576, 35 Pac. R. 415, upholding the right of the mayor to employ special counsel in an "emergency." But compare Waters *v.* Trovillo, 47 Kan. 197, 27 Pac. R. 822; Beal *v.* City of Roanoke, 90 Va. 77, 17 S. E. R. 738; City of Baltimore *v.* City of New Orleans, 45 La. Ann. 526, 12 So. R. 878.

[2] Brown *v.* Winterport, 79 Me. 305; Chouteau *v.* Allen, 70 Mo. 290; Sullivan *v.* School District No. 39, 39 Kan. 347; Moore *v.* Albany, 98 N. Y. 396; Albany City National Bank *v.* Albany, 92 N. Y. 363; Bank of Columbia *v.* Patterson, 7 Cranch (U. S.) 299; Supervisors, etc., of Marshal Co. *v.* Schenck, 5 Wall. 772; People *v.* Swift, 31 Cal. 26; San Francisco Gas Co. *v.* City of San Francisco, 9 Cal. 453; People *v.* Detroit, 28 Mich. 228, 15 Am. R. 202; Carey *v.* City of East Saginaw, 79 Mich. 73, 44 N. W. R. 168; Clark *v.* Lyon Co., 8 Nev. 181; Mills *v.* Gleason, 11 Wis. 470; Koch *v.* Milwaukee, 89 Wis. 220, 62 N. W. R. 918.

[3] Hague *v.* Philadelphia, 48 Pa. St. 527; Union Tp. *v.* Gibboney, 94 Pa. St. 534; McCracken *v.* San Francisco, 16 Cal. 591; Highway Comrs. of Sault Ste. Marie Co. *v.* Dusan, 40 Mich. 429; Spitzer *v.* Village of Blanchard, 82 Mich. 234, 46 N. W. R. 400; McDonald *v.* Mayor of New York, 68 N. Y. 23; Trester *v.* City of Sheboygan, 87 Wis. 496, 58 N. W. R. 747; Smith *v.* Newburg, 77 N. Y. 130; Nash *v.* St. Paul, 11 Minn. 174; Penn *v.* City of Laredo (Tex.), 26 S. W. R. 636; City of Bryan *v.* Paige, 51 Tex. 532, 32 Am. R. 637; McAleer *v.* Angell, 19 R. I. 688, 36 Atl. R. 588; Parsons *v.* Monmouth, 70 Me. 262; Bowditch *v.* Superintendent,

Where a contract by a municipal corporation is invalid when made, for failure to comply with certain statutory provisions, its subsequent ratification by the corporation generally requires the observance of the same formalities and provisions necessary to be complied with in the making of a valid contract.[1]

§ 25. **Power to compromise disputed claims or debts.**— Municipal corporations have the power to compromise disputed claims or debts against them. They may compromise doubtful controversies in which the corporation is a party either as plaintiff or defendant. The power to compromise or settle disputed claims is founded on the doctrine that where the power exists to create debts and incur liabilities a like power must obtain for the settlement of disputed claims; and an agreement to pay such claims is not void for want of consideration.[2] Thus a city council has authority to compromise with a party against whom the city holds a judgment by accepting, before the expiration of the time for an appeal, one-half of such judgment and costs, as payment in full.[3]

168 Mass. 239, 46 N. E. R. 1026; Wilhelm *v.* Cedar Co., 50 Iowa 254; Boston Electric Co. *v.* City of Cambridge 163 Mass. 64; Buttrick *v.* Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721; Lewis *v.* City of Shreveport, 108 U. S. 282, 2 Sup. Ct. R. 634; City of Shawneetown *v.* Baker, 85 Ill. 563; City of Laporte *v.* Gamewell & Co., 146 Ind. 466, 476. But see as to ratification of acts which the municipality had power to authorize, Silsby Mfg. Co. *v* City of Allentown, 153 Pa. St. 319; Moore *v.* City of Albany, 98 N. Y. 396; City of Mound City *v.* Snoddy, 53 Kan. 126, 35 Pac. R. 1112.

[1] Gutta Percha, etc., Co. *v.* Village of Ogalalla, 40 Neb. 775, 59 N. W. R. 513; Delafield *v.* State of Illinois, 2 Hill (N. Y.) 159; Hague *v.* Philadelphia, 48 Pa. St. 527; Marsh *v.* Fulton Co., 10 Wall. (U. S.) 676; Hotchin *v.* Kent, 8 Mich. 526; Murphy *v.* Louisville, 9 Bush (Ky.) 189; Estey *v.* Inhabitants of West Minster, 97 Mass. 324; Brenham *v.* San Jose, 24 Cal. 585; People, *ex rel.*, Attorney-General *v.* Lathorp, 24 Mich. 235; Wilhelm *v.* Cedar Co., 50 Iowa 254; City of St. Louis *v.* Armstrong, 56 Mo. 298; Town of Durango *v.* Pennington, 8 Colo. 257, 7 Pac. R. 14.

[2] People *v.* San Francisco, 27 Cal. 655; People *v.* Coon, 25 Cal. 635; Baileyville *v.* Lowell, 20 Me. 178; State *v.* Martin, 27 Neb. 441, 43 N. W. R. 244; Grimes *v.* Hamilton Co., 37 Iowa 290; Mills Co. *v.* Burlington, & Mo. R. R. Co., 47 Iowa 66; Hill *v.* Baker, 27 Am. & Eng. Corp. Cases 208; Artz *v.* Chicago, etc., R. R. Co., 34 Iowa 153; Augusta *v.* Leadbetter, 16 Me. 45.

[3] Agnew *v.* Bral, 124 Ill. 312. It has even been held that a municipal corporation may accept a note in pay-

When, by statute, the care, management and control of the county property, and power to settle all accounts, demands and causes of action against the county are conferred upon county boards, a county board has power to compromise its claims against the newly organized county for its proportion of indebtedness, and may, as part of such compromise, stipulate that tax certificates upon land in the newly organized county, which were required by the organic act to be assigned to it, shall remain the property of the original county.[1]

§ 26. **Contracts of guaranty and suretyship.**—A municipal corporation can not, without legislative authority, become surety for another corporation or an individual. The endorsement, or guaranty of bonds of a private enterprise, or the entering into any other contract of suretyship by the municipal authorities, is not within the ordinary scope of powers of the corporation and requires a special legislative grant. Such an authority can not be implied or deduced from the general and ordinary powers conferred upon municipalities.[2]

Under the well settled doctrine that a municipal corporation can only exercise such powers as are expressly granted and such incidental powers as are necessary to the proper exercise thereof, a city has no power to execute a guaranty of a promissory note as incidental to a power given by charter to sell negotiable paper; and such guaranty is void even in the hands of an innocent assignee for value.[3]

In an able opinion by the supreme court of Georgia, involving this subject, the court said: "The objects of a municipal corporation are, in the main, the preservation of order and

ment of a fine imposed for violation of an ordinance. Caldwell *v.* Wright, 25 Ill. App. 74.

[1] Hall *v.* Baker, 74 Wis. 118; Collins *v.* Welsh, 58 Iowa 72; Shanklin *v.* Madison Co., 21 Ohio St. 575.

[2] Blake *v.* Mayor of Macon, 53 Ga. 172; Clark *v.* Des Moines, 19 Iowa 199; Chamberlin *v.* Burlington, 19 Iowa 395; Louisiana State Bank *v.* New Orleans Navigation Co., 3 La. Ann. 294. In this case the municipal corporation was sought to be held liable upon its guaranty of bonds, issued by the Navigation Company, which the mayor, in the name of the municipality, was authorized by certain resolutions of the council to indorse. It was held that the council transcended its powers, and the guaranty did not impose any legal obligation upon the municipality.

[3] Carter *v.* Dubuque, 35 Iowa 416.

the doing of such acts for the public good as can not well be done by private enterprise; and it is insisted that it is within the scope of municipal power not to build a street road, but to aid by the donation of the credit of the city, to a private corporation, to build it, and to take the profits of it. We do not think this is within the ordinary scope of municipal authority, nor can any authorities, as we believe, be found carrying the objects of a corporation that far. We are clear that the proposed endorsement of the bonds by the city authorities for the street railroad company is *ultra vires*, and, therefore, void."[1]

A municipal corporation has no implied power to lend its credit or make accommodation paper for the benefit of citizens, to enable them to execute private enterprises. To recognize such a right would be to break down, to a great extent, the checks and limitations on the powers of corporations, checks and limitations designed to protect and secure the inhabitants against the dangers of speculative and extra municipal projects.[2]

§ 27. **Legislative power and limitation over contracts of municipality.**—Where a municipal corporation enters into a contract or becomes indebted, the rights of the creditor based upon the obligation of the contract can not be impaired by subsequent legislative enactment. Thus, where a statute authorizes a municipal corporation to issue bonds and levy a tax to pay them and the bonds have been sold in the market, the power of taxation thus conferred constitutes a contract within the meaning of the federal constitution, and the legislature has no power to impair the same by any subsequent legislation. The state and the corporation in such case are equally bound, and a subsequent statute which repeals or restricts the power of taxation previously granted is, in so far as it affects the bonds, an absolute nullity. In such case it seems that it is the duty of a corporation to levy and collect the tax in all respects as

[1] Blake *v.* Mayor, etc., of Macon, 53 Ga. 172. See, also, 2 Elliott R. R., § 481.

[2] Clark *v.* Des Moines, 19 Iowa 199; Smead *v.* Indianapolis, Pittsburgh & Cleveland R. R. Co., 11 Ind. 104. But see State Board of Agriculture *v.* Citizens' St. Ry. Co., 47 Ind. 407.

if the second statute had not been passed, and if it does not perform that duty, *mandamus* will lie to compel it.[1]

Where the charter of a city, at the time of the issue and sale of its bonds, makes it the duty of the common council, when any judgment should be rendered against the city to levy and collect the amount the same as other city charters, and declares that private property within the city shall not be taken on execution to pay any city debt, a subsequent act of the legislature prohibiting the city from levying such a tax as would be necessary to discharge a judgment rendered against it for interest on said bonds would deprive the creditor of the only efficient means of collecting his debt, and would be repugnant to the constitution of the state, and, therefore, unconstitutional and void.[2]

§ 28. **Legislative power over funds and revenues.**—The power of the legislature over municipal corporations extends to making provisions concerning their funds and revenues for any proper purpose which will subserve the best interest of the municipality.[3]

[1] Von Hoffman *v.* Quincy, 4 Wall. 535; Lansing *v.* Co. Treasurer, 1 Dillon (C. C.) 522; Muscatine *v.* R. R. Co., 1 Dillon 536; City of Galena *v.* Amy, 5 Wall. 705; Meriwether *v.* Garrett, 102 U. S. 472; Butz *v.* Muscatine, 8 Wall. 578; Lee Co. *v.* Rogers, 7 Wall. 181. But see Shapleigh *v.* City of San Antonio, — U. S. —, 17 Sup. Ct. R. 957, 959.

[2] State *v.* Madison, 15 Wis. 33; Von Baumbach *v.* Dade, 9 Wis. 510, 76 Am. Dec. 283; Phelps *v.* Rooney, 9 Wis. 70, 76 Am. Dec. 244; Smith *v.* Appleton, 19 Wis. 468; City *v.* Lamson, 9 Wall. 477; State *v.* Milwaukee, 25 Wis. 122; Mt. Pleasant *v.* Beckwith, 100 U. S. 514. Where the effect of an act of the legislature authorizing a city to fund its floating debt was, in substance, a pledge to those who surrendered their claims and received new obligations, of a portion of its revenues and property, to be applied to the payment of its obligations in a specified manner, it was held that this, if acted on, constituted a contract which could not be materially altered or changed either by the municipality or the legislature, without the consent of the creditor; but that a subsequent act, simply changing the mode of levying the taxes, and which did not and could not affect the result or impair the security of the creditors, was not invalid. People *v.* Bond, 10 Cal. 563; People *v.* Woods, 7 Cal. 579. See, also, Supervisors of Sadsbury *v.* Dennis, 96 Pa. St. 400.

[3] Creighton *v.* San Francisco, 42 Cal. 446; Blanding *v.* Burr, 13 Cal. 343; Lucas *v.* Board, 44 Ind. 524; Dennis *v.* Maynard, 15 Ill. 477; Sangamon Co. *v.* Springfield, 63 Ill. 66; Rich-

Thus the revenues of a county are not the property of the county in the sense in which that of a private person or corporation is regarded. The whole state has an interest in the revenue of the county, and for the public good the legislature must have the power to direct its application. An act, therefore, amending the charter of the city of Springfield and providing that after certain expenditures are allowed the county of Sangamon and the city, the surplus of the county taxes shall be divided between the city and the county in proportion to the amount collected from each, the city's portion to be applied in repairing streets, and building and repairing bridges in the city, was declared to be constitutional and valid.[1]

§ 29. **Compulsory debts and liabilities.**—Whether a municipal corporation may be compelled to create a debt or liability without its aid or consent depends upon the constitutional provisions of the state, and also upon the nature and purposes for which the debt or liability is to be incurred. In all transactions pertaining to the general or public concern, and where there is no local right to act independently of the state, as a general proposition the state may exercise compulsory authority and enforce the performance of local duties, either by employing local officers for such a purpose, or through agents or officers designated for that purpose by the municipality. Judge Cooley asserts the following doctrine: "The proposition which asserts the amplitude of legislative control over municipal corporations, when confined, as it should be, to such corporations as agencies of the state in its government, is entirely sound. They are not created exclusively for that purpose, but have other objects and purposes peculiarly local,

land Co. *v.* Lawrence Co., 12 Ill. 1; Home Ins. Co. *v.* City of Augusta, 93 U. S. 116; People *v.* Supervisors, 50 Cal. 561; People *v.* Ingersoll, 58 N.Y. 1; Youngblood *v.* Sexton, 32 Mich. 406; City of Indianapolis *v.* Indianapolis Home, etc., 50 Ind. 215; State *v.* Commissioners, etc., (N. Car.), 30 S. E. R. 352.

[1] People *v.* Power, 25 Ill. 169; Gutzweller *v.* People, 14 Ill. 142. See, also, Borough of Dunmore's Appeal, 52 Pa. St. 374; People *v.* Supervisors, 94 N. Y. 263; Layton *v.* New Orleans, 12 La. Ann. 515; Stone *v.* Charlestown, 114 Mass. 214; Sedgwick Co. *v.* Bunker, 16 Kan. 498.

and in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens."[1]

§ 30. **Mandatory statutes to compel the payment of debts and liabilities.**—The law seems to be firmly established that it is competent for the legislature to impose upon a municipality the payment of debts or liabilities, just in themselves, and for which a valid consideration has been received, but which from some cause can not be enforced at law. The supreme court of the United States has held that a law requiring municipal corporations to pay such a debt or liability is not within the constitutional provision inhibiting the passage of a retroactive law.[2] Thus, it has been held that the legislature may require county commissioners to provide funds for paying the valid indebtedness of a county, under a contract for the erection of public buildings therein, by issuing and selling its bonds to pay such indebtedness.[3]

The legislature may, as a general rule, so control the affairs of a municipal corporation, by appropriate legislation, as ultimately to compel it, out of the funds in its treasury or by taxation, to pay a demand which, in good conscience, it ought to pay, though there be no legal liability to pay the same.[4]

The courts in California assert the following rule: The power of the legislature to appropriate the money of municipal corporations in payment of claims ascertained by it to be equitably due to individuals, though such claims be not en-

[1] People *v.* Detroit, 28 Mich. 228, 15 Am. R. 202; People *v* Batchellor, 53 N. Y. 128; Hager *v.* Supervisors, 47 Cal. 222; Green *v.* Swift, 47 Cal. 536. But "it is believed that the legislature has no power, against the will of a municipal corporation, to compel it to contract debts for local purposes in which the state has no concern, or to assume obligations not within the ordinary functions of municipal government." Cooley's Const. Lim. 284. See, also, People *v.* Mayor, 51 Ill. 17, 31; Choisser *v.* People, 140 Ill. 21; Hasbrouck *v.* Milwaukee, 13 Wis. 42. But compare Comrs. *v.* State, 45 Ala. 399; Thompson *v.* Perrine, 106 U. S. 589.

[2] New Orleans *v.* Clark, 95 U. S. 644.

[3] Jefferson Co. *v.* People, 5 Neb. 127.

[4] Thomas *v.* Leland, 24 Wend. 65; People *v.* Supervisors, 70 N. Y. 228; Blanding *v.* Burr, 13 Cal. 343.

forcible in the courts, depends largely upon the legislative conscience, and will not be interfered with by the judicial department except in exceptional cases.[1]

The rule in Kansas is that if there is no underlying moral obligation to support legislation creating a legal liability, it is the duty of the courts to declare such legislation unconstitutional. If, however, there is any moral obligation whatever, the question whether it is sufficient to authorize the legislature to provide a remedy for enforcing it is wholly a matter of legislative discretion.[2]

However, the legislature has no power to compel a municipality to pay a debt or liability made against it which it is under no obligation, moral or equitable, to pay, nor can the legislature require a court to render judgment upon such a debt or liability upon proof of the amount thereof.[3]

§ 31. **Legislative power to validate municipal acts.**—The legislature, as a general rule, has the power to cure irregularities or defects, and legalize proceedings of municipal corporations, which, without such legislation, would be invalid because unauthorized, or because not performed in a manner provided by law. Thus, where a municipality was authorized to borrow a sum of money and pledge its property as security, and it expended the money so raised for the purpose of aiding works of internal improvement, and the legislature subsequently passed another act reciting the first and the disposition made of the money, and authorized another loan of like amount, it was held that this constituted a ratification of the disposition of the money.[4]

Where the original purpose for which the power of taxation

[1] Creighton *v.* San Francisco, 42 Cal. 447.

[2] Craft *v.* Lofinck, 34 Kan. 365.

[3] Hoagland *v.* Sacramento, 52 Cal. 142; Craft *v.* Lofinck, 34 Kan. 365; People *v.* Haws, 37 Barb. 440; Board of Supervisors *v.* Cowan, 60 Miss. 876.

[4] Winn *v.* Macon, 21 Ga. 275; City of Bridgeport *v.* Railroad Co., 15 Conn. 475. A subscription by a municipal corporation to the stock of an incorporated company, though unauthorized by the charter of a municipality, has been held to be binding if subsequently ratified by the legislature. First Municipality of New Orleans *v.* New Orleans Theatre Co., 2 Rob. (La.) 209.

is invoked is one of the ordinary purposes of municipal government, and within the powers granted, in the absence of fraud or oppression in the creation of the debt or burden and no inequality or injustice appearing in the apportionment of the tax, the supreme court of Kansas held that the legislature could, by subsequent enactment, cure any defect in the proceedings to collect the tax which it could, in the first instance, by prior enactment, have made immaterial.[1]

But in case of a void subscription by a municipal corporation to the stock of a railroad, the legislature has no power, under the constitution of Illinois, to pass a law rendering the election and subscription valid.[2]

Judge Cooley lays down the following doctrine upon this subject: "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if their regularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by a prior law, it is equally competent to make the same immaterial by a subsequent law."[3]

§ 32. **Debts and liabilities, how affected by dissolution of municipality.**—Where a municipality is dissolved and its territory is divided and annexed to two others by a legislative act, unless the legislature regulates the rights and duties of the

[1] City of Emporia *v.* Norton, 13 Kan. 569.

[2] Marshall *v.* Silliman, 61 Ill. 218.

[3] Cooley Const. Lim., 371. Thus, in Lockhart *v.* Troy, 48 Ala. 579, it was decided that a healing statute was not unconstitutional by reason of giving validity to an act, irregularly done, which the legislature could have authorized to be done in the irregular way in the first instance. See, also, Mattingly *v.* District of Columbia, 97 U. S. 690; Erskine *v.* Nelson County, 4 N. Dak. 66, 27 L. R. A. 696, and note; Baker *v.* Seattle, 2 Wash. 576; Nolan County *v.* State, 83 Tex. 182; Brownell *v.* Greenwich, 114 N. Y. 518, 4 L. R. A. 685; McMillen *v.* Boyles, 6 Iowa 304. But the legislature can not validate an act prohibited by the constitution. State *v.* Whitesides, 30 S. Car. 579, 3 L. R. A. 777; Quaker City Nat. Bank *v.* Nolan County, 59 Fed. R. 660; Sykes *v.* Columbus, 55 Miss. 115; Mosher *v.* Ackley Independent School Dist., 44 Iowa 122.

two latter corporations, they succeed to all the public property, rights and immunities of the extinguished municipality, and become liable for all the debts and liabilities previously contracted by it, and are vested with the power to raise revenue for the purpose of paying such debts and liabilities by levying taxes upon the property transferred and the persons residing within the newly formed municipality.[1] And where two municipalities are consolidated, the consolidated municipality succeeds to all the rights and liabilities of the former municipality.[2]

The general doctrine is firmly established that in the dissolution of a municipality the legislature has the power to apportion the property and charge the debts and liabilities of the dissolved municipality upon the corporation to which the territory of the dissolved municipality is annexed, in such a manner and proportion as may seem just and equitable to the legislature.[3]

§ 33. **Apportionment of debts and liabilities upon division of municipalities.**—The legislature has plenary power over the boundaries and extent of municipal corporations, and in the absence of constitutional restrictions it has the power to divide them or to diminish their territorial limits. This power is purely legislative. And where, upon the division of a municipality, the legislature does not prescribe any mode for the apportionment of the property or make any provision that the new corporation shall pay any portion of the debts or liabilities of the old, the old corporation will hold all the corporate property within her new limits and be entitled to all the claims owing to the old corporation, and will be held liable

[1] Mt. Pleasant *v.* Beckwith, 100 U. S. 514; Mobile *v.* Watson, 116 U. S. 289; Shapleigh *v.* City of San Antonio, — U. S. —, 17 Sup. Ct. R. 957, 959; Smith *v.* Mayor, 81 Mich. 123, 45 N. W. R. 961; Watson *v.* Comrs., 82 N. Car. 17; Neilson *v.* Newark, 19 N. J. L. 246; Amy *v.* Selma, 77 Ala. 103.

[2] Dousman *v.* Milwaukee, 1 Pinn. (Wis.) 81; Jefferson City *v.* New Orleans, 41 La. Ann. 91.

[3] Thompson *v.* Abbott, 61 Mo. 176; Borough of Dunmore's Appeal, 52 Pa. St. 374; Olney *v.* Harvey, 50 Ill. 453; Morgan *v.* Beloit, 7 Wall. 613; People *v.* Supervisors, 94 N. Y. 263; Morrow Co. *v.* Hendryx, 14 Ore. 397; Board, etc., Clay Co. *v.* Chickasaw, 64 Miss. 534.

for all the debts of the corporation existing before and at the time of the division. And the new corporation will hold all the property within her boundary to which the old corporation will have no claim. Thus, it was held that where the legislature of Wyoming Territory organized two new counties, and included in their limits a part of the territory of an existing county, but made no provision for apportioning debts or liabilities, the old county being solely responsible for the debts and liabilities it had previously incurred, had, on discharging them, no claim on the new county for contribution.[1]

But a different rule seems to obtain as to money, choses in action or other kindred property in existence at the time of a division of a municipality. The rule in such cases, in the absence of an express provision as to the disposal of that class of property, seems to be that the respective claims of the two corporations become a matter of equitable jurisdiction, and must be adjusted upon equitable principles. Thus, where a new township was created by the division of the territory of an existing township, it was held the former was entitled to an equitable division of the funds belonging, or to be apportioned, to the township as it was originally constituted; and if there were no debt to be provided for, the new township was to receive its proportionate share of the township fund, based on the amount of the taxable property located within its territory, and the number of tax-payers therein, upon whom a poll-tax had been assessed, and the special school revenue and tuition fund was apportioned on the basis of the enumeration of school children residing within the territory constituting such new township.[2]

§ 34. **Rights of creditors as affected by annulling the charter of a city.**—The law is firmly settled by numerous well-considered cases that no subsequent change in the boundaries of a municipality or in the organization or powers of a municipality, unless there is an entire destruction of the corporation,

[1] Laramie Co. *v.* Albany Co., 92 U. S. 307; Morgan *v.* Beloit, 7 Wall. 613; Mt. Pleasant *v.* Beckwith, 100 U. S. 514; Mobile *v.* Watson, 116 U. S. 289.

[2] Towle *v.* Brown, 110 Ind. 599; Johnson *v.* Smith, 64 Ind. 275.

can affect the rights of creditors to proceed against the municipality or its officers.[1]

But if the state should take away altogether the corporate powers of a debtor municipality, and create instead one or more entirely new corporations, which should be, not successors to the old bodies under new names, but new and distinct creations, the creditors might be without remedy, as taxation could not be enforced under the old law after the corporation ceased to exist.[2] Thus, it has been held that the property of individuals of a defunct corporation could not, by judicial proceedings, be subjected to the payment of the old debt; also that all corporate property held for public use would pass, when the corporation ceased to exist, under the immediate control of the state. Even taxes levied before the repeal of the charter could only be collected under legislative authority, and in the absence of such authority the remedy of the creditors would be an appeal to the legislature.[3]

[1] United States *v.* Port of Mobile, 4 Woods 536; Board, etc., Decatur Co. *v.* State, 86 Ind. 8; Robinson *v.* Butte Co., 43 Cal. 353; United States *v.* Clark Co., 95 U. S. 769; Knox Co. *v.* United States, 109 U. S. 229; Morris *v.* State, 62 Tex. 728.

[2] Merriwether *v.* Garrett, 102 U. S. 472; Cooley on Taxation, 78.

[3] Merriwether *v.* Garrett, 102 U. S. 472; Luehrman *v.* Taxing District, 2 Lea 425; Uhl *v.* Taxing District, 6 Lea 610.

CHAPTER III.

CONSTITUTIONAL LIMITATIONS UPON THE POWER TO INCUR INDEBTEDNESS.

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50. Limitations of indebtedness under the South Carolina constitution.
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57. As to the time the debt is incurred.
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59. Implied power to incur indebtedness.
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§ 67. Indebtedness created on contracts extending into the future.
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71. Compulsory or imposed obligations.
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73. When a municipal corporation is not liable in tort for failure to pay indebtedness contracted in violation of constitutional limitation.
§ 74. When limitation of indebtedness no defense in actions arising on torts.
75. Validity of contracts for attorney's fees when indebtedness is in excess of constitutional limit.
76. Constitutional limitation no defense to actions for recovery of illegal tax.
77. Constitutional limitation in case of several municipal corporaporations within the same territory.
78. As to the effect of constitutional limitation by annexation of two or more cities into one.

§ 35. **General constitutional provisions.**—The constitutions of many of the states, especially those which have been recently adopted, contain provisions limiting the amount of indebtedness which municipal corporations are authorized to create. These constitutional provisions restrict and control both the municipality and the legislature, and are of great importance in the consideration of municipal securities.

Thus, in Illinois, the constitution contains a provision that no county, city, township, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per cent. on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district or other municipal corporation, incurring indebtedness as aforesaid, shall before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same.

The constitution of Iowa contains the following provision: "No county, or other political or municipal corporation, shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per cent. on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness."

The state of Indiana has a constitutional provision very similar to that of Illinois and Iowa. It is as follows: "No political or municipal corporation in this state shall ever become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding two per centum on the value of taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void."

Nebraska, Minnesota, Colorado and several of the other states also have either general or special limitations upon the power to create municipal indebtedness.

§ 36. **General nature and construction governing constitutional provisions.**—Limitations imposed by the constitution upon the power of municipal corporations to incur indebtedness should be construed with reference to existing facts, and with a view to the practical working of that instrument, and such a literal construction as would defeat the object to be attained should not be adopted.[1]

When constitutional limitations and prohibitions are addressed to the legislature the effect is to limit its future action only. The constitution is prospective in its operation, and existing statutes conferring power upon municipalities are not abrogated thereby. Thus, the constitution of Indiana prohibiting municipal corporations from becoming indebted to an amount in the aggregate exceeding two per cent. on the value of their taxable property, and providing that all obligations in excess of such amount shall be void, is only prospective in its

[1] Law *v.* People, 87 Ill. 385.

operations, and will not prevent such corporation from issuing new bonds, with coupons for future interest, for the purpose of funding debts, with accrued interest, existing prior to the adoption of such amendment.[1]

Section 10 of the constitution of the United States declares, among other things, that no state shall pass any *ex post facto* law, or law impairing the obligation of contracts. This limitation upon the power of a state is as restrictive upon its action through its organic law as it is upon the character of the statutes which its legislature may enact.[2] Hence, a constitutional amendment prohibiting corporations from becoming indebted to an amount in the aggregate exceeding two per cent. of the value of the taxable property, can not have any retrospective effect upon the existing indebtedness of municipal corporations at the time of its adoption. For the same reason it does not impair, and was, presumably, not intended to impair, the obligation of any of the contracts into which municipal corporations had already entered, whether for the payment of a principal sum of money or of interest which had accrued, or might thereafter accrue, thereon. In other words, its operation was only prospective. Where the limit of indebtedness has already been reached, it prohibited the contracting of any new or further indebtedness; and where that limit had not been reached, it simply restrained municipal corporations from incurring new debts in excess of such limit.[3]

But if such limitation is addressed to the municipality di-

[1] Powell *v.* City of Madison, 107 Ind. 106; Myers *v.* City of Jeffersonville, 145 Ind. 431.

[2] Railroad Co. *v.* McClure, 10 Wall. 511; Moultrie Co. *v.* Rockingham Tencent Savings Bank, 92 U. S. 631.

[3] Powell *v.* City of Madison, 107 Ind. 106; Scott *v.* City of Davenport, 34 Iowa 208; State *v.* Clark, 23 Minn. 422; Smith *v.* Clark Co., 54 Mo. 58; State *v.* Sullivan Co., 51 Mo. 522; Kansas City, etc., R. R. Co. *v.* Aldermen, 47 Mo. 349; State *v.* Macon Co., 41 Mo. 453; Fosdick *v.* Perrysburg, 14 Ohio St. 472; Thompson *v.* Kelly, 2 Ohio St. 647; Case *v.* Dillon, 2 Ohio St. 607; Ralls Co. *v.* Douglass, 105 U. S. 728; Louisiana *v.* Taylor, 105 U. S. 454; Cass Co. *v.* Gillett, 100 U. S. 585; Calhoun Co. *v.* Galbraith, 99 U. S. 214; Schuyler Co. *v.* Thomas, 98 U. S. 169; Macon Co. *v.* Shores, 97 U. S. 272; Scotland Co. *v.* Thomas, 94 U. S. 682; Callaway Co. *v.* Foster, 93 U. S. 567; Fairfield *v.* Gallatin Co., 100 U. S. 47; Moultrie Co. *v.* Fairfield, 105 U. S. 370; Red Rock *v.* Henry, 106 U. S. 596.

rectly, it limits or abrogates all such authority which has been given, unless vested rights have been acquired thereunder.[1]

Judge Dillon says: "Such limitations have been found by experience to be necessary to prevent extravagance, are remedial in their nature, are based upon the wise policy of paying as you go, and ought, therefore, to be construed and applied to secure the end sought."[2]

§ 37. **Constitutional provisions construed by the supreme court of the United States.**—The subject under consideration has been considered and discussed by the supreme court of the United States in several important cases. In construing the constitutional provision of Iowa, Mr. Justice Gray said: "The scope and meaning of this provision of the fundamental and paramount law of the state are clear and unmistakable. No municipal corporation 'shall be allowed' to contract debts beyond the constitutional limit. When that limit has been reached, no debt can be contracted 'in any manner, or for any purpose.' The limit of the aggregate debt of the municipality is fixed at five per centum of the value of the taxable property within it, and that value is to be ascertained 'by the last state and county tax list,' which are public records, open to all, and of the contents of which all are bound to take notice. The prohibition is addressed to the legislature as well as to all municipal boards and officers and to the people, and forbids any and all of them to create or to give binding force to any debts of the corporation in excess of the limit prescribed. The prohibition extending to debts contracted 'in any manner or for any purpose,' it matters not whether they are in every sense new debts, or are debts contracted for the purpose of paying old ones, so long as the aggregate of all debts, old and new, outstanding at one time, and for which the corporation is liable to be sued,

[1] Norton *v.* Brownsville Taxing District, 129 U. S. 479; Aspinwall *v.* Comrs., 22 How. 364; Wadsworth *v.* Supervisors, 102 U. S. 534; Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625; Railroad Co. *v.* Falconer, 103 U. S. 821; Jarrolt *v.* Moberly, 103 U. S. 580; Kelley *v.* Milan, 127 U. S. 139; Pulaski *v.* Gilmore, 21 Fed. R. 870; Scotland Co. *v.* Hill, 132 U. S. 107; Ralls Co. *v.* Douglass, 105 U. S. 728.

[2] 1 Dillon on Munic. Corp., § 130.

exceeds the constitutional limit. The power of the legislature in this respect being restricted and controlled by the constitution, any statute which purports to authorize municipal corporations to contract debts in any manner or for any purpose whatever in excess of that limit is to that extent unconstitutional and void. * * It is true that if the proceeds of the sale are used by the municipal officers as directed by the statute in paying off the old debt, the aggregate indebtedness will ultimately be reduced to the former limit. But it is none the less true that it has been increased in the interval, and that unless those officers do their duty the increase will be permanent. It would be inconsistent, alike with the words and objects of the constitutional provision framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts to be contracted beyond that limit depend solely upon the discretion or the honesty of their officers. There could be no better illustration of the reasonableness, if not the necessity, of this construction in order to secure to municipal corporations the protection intended and declared by the constitutional statute than is afforded by the facts of the present case. The total valuation of the property of the district, as shown by the county and state tax list before it issued the bonds in question, was $131,038, five per cent. of which, or $6,551.90, was the limit beyond which it was prohibited by the constitution to contract debts. Its outstanding bonded debt was already not less than $20,000, which, upon the facts found, must be assumed to be valid. For the purpose of funding that debt it executed and sold bonds to the amount of $25,000, and it actually applied less than $6,000 of the proceeds of the sale to the payment of outstanding bonds. The result of holding the new bonds good would be to double the whole bonded debt of the district, and to bring it up to about thirty per cent. of the valuation. This construction of the constitution of Iowa appears to us to be warranted, and indeed required, by previous decisions of this court."[1]

[1] Doon Tp. *v.* Cummins, 142 U. S. 366. There is, however, a strong dissenting opinion in this case, and in so far as it seems to hold that the purchaser of bonds must see that the proceeds are properly applied, it has met

§ 38. **The same subject—Illinois constitution.**—In construing the constitution of Illinois, which is substantially in the same language as the constitution of Iowa, the supreme court of the United States, speaking by Mr. Justice Harlan, said: "The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount. No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declared it should not be allowed to incur."[1]

This constitutional provision of the state of Illinois was again before the supreme court of the United States, and Mr. Justice Miller, delivering the opinion of the court, said: "The language of the constitution is that no city, etc., 'shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' It shall not become indebted; shall not incur any pecuniary liability. It shall not do this in any manner; neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose, no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt in any manner or for any purpose whatever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as in a court of law."[2]

§ 39. **The same subject—Nebraska constitution.**—The constitution of Nebraska of 1875, article 12, section 2, prohibits any county or subdivision of the state from ever making dona-

with much criticism. See, however, Anderson *v.* Orient Fire Insurance Co., 88 Iowa 579, 55 N. W. R. 348.

[1] Buchanan *v.* Litchfield, 102 U. S. 278.

[2] Litchfield *v.* Ballou, 114 U. S. 190.

tions to any railroad without a vote of the qualified electors thereof, at an election held by authority of law, and provides that its donations "in the aggregate shall not exceed ten per cent. of the assessed valuation of the county," and that "no bonds or other evidences of indebtedness so issued shall be valid, unless the same shall have indorsed thereon a certificate signed by the secretary and auditor of the state, showing that the same is issued pursuant to law." The effect and limitation of this constitutional provision was before the supreme court of the United States, and it was held that bonds issued by a county beyond ten per cent. of its assessed valuation were void, even in the hands of a *bona fide* holder, although each bond, after stating the whole amount issued, stated that they were issued in pursuance to an order of the county commissioners and authorized by an election held on a certain day, and under and by virtue of a certain statute and the constitution of the state, and bore a certificate of the secretary and auditor that "it was issued pursuant to law." In delivering the opinion of the court, Mr. Justice Matthews said: "We regard the entire section as a prohibition upon the municipal bodies enumerated, in the matter of creating and increasing the public debts, by express and positive limitations upon the legislative power itself. * * * No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the constitution the standard for measuring the limit of the municipal power."[1]

§ 40. **The same subject—Colorado constitution.**—The constitution of Colorado of 1876, article 11, section 6, provides that the indebtedness contracted in any one year by any county having a valuation of not less than one million of dollars shall not exceed a certain per cent. on its assessed valuation, and that "the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the

[1] Dixon Co. *v.* Field, 111 U. S. 83.

amount above herein limited." This constitutional provision was construed by the supreme court in an action against Lake county, which was based on a large number of county warrants issued for the ordinary county expenses, such as witness and jurors' fees, election costs, charges for the board of prisoners, county treasurer's commissions, and so forth. The county set up several defenses, but the main defense offered was that of want of authority on the part of the county commissioners to issue the warrants in question, or any of them. It was claimed that section 6, article 11, of the state constitution of 1876, fixes a maximum limit beyond which no county can contract an indebtedness, and the warrants sued on were issued after that limit has been reached, and even exceeded, and that they are all for that reason void. The opinion of the supreme court was delivered by Mr. Justice Lamar, who said: "Defendant in error insists that the interpretation contended for by the county leads to certain absurd consequences, namely, that it is senseless to limit the powers of the county to incur debt generally, since its exercise of such a power may, by sudden exigencies, become imperatively necessary to the discharge of its functions; that it would be to require the county to provide in advance, by taxation or otherwise, for the payment of expenses which, from their nature, can only be guessed at; that it would be to enable any county in two years by a vote and a loan to exhaust the whole possible indebtedness in the way of building roads and bridges, leaving no margin for other necessities; that it would be to destroy the county government, since the county officers and others will not work for nothing, and the margin of possible debt is in nearly all the counties already reached; and that it would be to avoid nearly all the tax payments heretofore made in warrants. All of these objections could well be answered from the facts as disclosed by the bill of exceptions, but it is not necessary. We can not say, as a matter of law, that it was absurd for the framers of the constitution for this new state to plan for the establishment of its financial system on a basis that should closely approximate the cash basis. It was a scheme favored by some of the ablest of the early

American statesmen. Nor can the fact disclosed in the bill of exceptions, that after the adoption of the state constitution the county officials and many of the people, designedly or undesignedly, disregarded the constitutional rule, render the plan absurd. If it was a mistaken scheme, if its operation has proved or shall prove to be more inconvenient than beneficial, the remedy is with the people, not with the court."

After reviewing the Wisconsin and Illinois cases on this subject, the learned justice said: "In the light of these principles expressed in authorities quoted, and in many others, we must decline to read the expression in section 6, 'and the aggregate amount of indebtedness of any county for all purposes,' etc., as if it were written 'and the aggregate amount of *such* indebtedness,' etc. This the defendant in error concedes to be necessary to his case. We see no admissible reason for the introduction of this restrictive word *such*, except to alter radically the plain meaning of the sentence. Neither can we assent to the proposition of the court below that there is as to this case a difference between indebtedness incurred by contracts of the county, and that form of debt denominated 'compulsory obligations.' The compulsion was imposed by the legislature of the state, even if it can be said correctly that the compulsion was to incur a debt; and the legislature could no more impose it than the county could voluntarily assume it, as against the disability of a constitutional prohibition. Nor does the fact that the constitution provided for certain county officers, and authorized the legislature to fix their compensation and that of other officials affect the question. There is no necessary inability to give both of the provisions their exact and literal fulfillment. In short, we conclude that section 6 aforesaid is a limitation upon the power of the county to contract any and all indebtedness, including all such as that sued upon in this action."[1]

§ 41. **Constitutional provisions of California construed.**— Article 11, section 18, constitution of California, adopted in 1879, provides that "No county, city, township, board of

[1] Lake Co. Comrs. *v.* Rollins, 130 U. S. 662.

education or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified voters therein, voting at an election to be held for that purpose, and before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereon within twenty years. Any indebtedness or liability incurred contrary to this provision shall be void."

In construing this provision of the constitution the supreme court of California held, that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income and revenue of any future year.[1]

But the refunding of valid municipal bonds or warrants as authorized by the California Police Code[2] is not prohibited by the constitution.

§ 42. **Constitutional provision of Colorado construed.** — The constitution of Colorado contains a provision that "no county shall contract any debt by loan, except for the purpose of erecting the necessary public buildings and making or repairing public roads or bridges; and such indebtedness contracted in any one year shall not exceed, in counties having an assessed valuation of taxable property exceeding $5,000,000, $1.50 on each $1,000 thereof; and counties having an assessed valuation of less than $5,000,000, $3 on each $1,000 thereof; and the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of the present constitution, shall not at any time exceed the amount above limited unless in manner provided by law at a

[1] San Francisco Gas Co. *v.* Brickwedel, 62 Cal. 641; Shaw *v.* Statler, 74 Cal. 258, 15 Pac. R. 833; Schwartz *v.* Wilson, 75 Cal. 502; 17 Pac. R. 440; Bradford *v.* City and County of San Francisco, 112 Cal. 537, 44 Pac. R. 912; McBean *v.* City of Fresno, 112 Cal. 159, 44 Pac. R. 358.

[2] Cal. Pol. Code 1880, §§ 4445–4449; City of Los Angeles *v.* Teed, 112 Cal. 319, 44 Pac. R. 580.

general election. The question of incurring such debts shall be submitted to and approved by a majority vote of such of the qualified electors of such county as in the last year preceding such election shall have paid a tax upon the property assessed to them in such county."

In construing this constitutional provision the supreme court of Colorado held that a county which has reached the constitutional limit of indebtedness may constitutionally make an assignment of the annual revenue accruing from taxes levied but uncollected for the current year, providing such assignment shall not be in excess of the amount covered by the annual levy for the year in which such assignment is made and the warrant or instrument of assignment is expressly made payable out of the incoming revenue for the current year, and is an assignment *pro tanto*, without recourse, by the county, of such fund; and that the limitation imposed upon the county's indebtedness by the constitution includes debts contracted by the county authorities under the direct authority of the legislature, as well as debts contracted by them under their general statutory powers. There can be no legal indebtedness beyond the constitutional limit after such limit is reached. Therefore warrants or other instruments representing supposed municipal liability are of no legal force or effect.[1]

County authorities as well as all parties dealing with them must take notice of the limit which the people in their constitution have prescribed for county indebtedness. In determining the amount of county indebtedness, at any time, county warrants are to be taken into account, and any warrant which increases the indebtedness over and beyond the limit fixed is in violation of the constitutional provision and, therefore, void.[2]

The provision in the constitution of Colorado providing that, "the aggregate amount of county indebtedness for all purposes shall not at any time exceed twice the amount the above herein limited" was held to be a limitation of indebtedness, whatever its form, including county warrants and debts

[1] People *v.* May, as treasurer, etc., 9 Colo. 404, 12 Pac. R. 838.

[2] People *v.* May, 9 Colo. 80, 10 Pac. R. 641.

contracted under the direct authority of the legislature; and differs from the constitution of Missouri, which limits taxation as well as indebtedness.[1]

§ 43. **Constitutional provisions of Indiana construed.**—The constitutional provision in Indiana, which is elsewhere quoted,[2] has been construed in many well-considered cases. Under that provision a city can not incur an indebtedness, where the limit has been reached, even for current expenses, as by issuing an order on its treasury where there are no funds or means provided for its payment.[3]

Every indebtedness incurred in any manner or for any purpose in excess of the constitutional limit is within the prohibition.[4]

But obligations payable out of a particular fund, for which the fund only and not the municipality is liable, are not within the inhibition;[5] and the purchase of a fire alarm telegraph, when there is money on hand appropriated to fire purposes sufficient to pay for the same is not a violation of the constitutional provision.[6]

So, the expense of light, water and the like, is payable out of the current revenues, and a contract to pay rental for them for a long period, in monthly or annual installments as the compensation is earned, is not the creation of a debt for the aggregate sum within the meaning of the constitution.[7]

§ 44. **Constitutional provisions of Iowa construed.**—The constitution of Iowa forbids municipal corporations to become indebted in any manner, for any purpose, to an amount exceeding five per centum on the value of the taxable

[1] People *v.* May, 9 Colo. 414, 15 Pac. R. 36.

[2] *Ante*, § 35.

[3] Sackett *v.* City of New Albany, 88 Ind. 473.

[4] City of Laporte *v.* Gamewell, etc., Co., 146 Ind. 466, 469; Town of Winamac *v.* Huddleston, 132 Ind. 217.

[5] Quill *v.* City of Indianapolis, 124 Ind. 292; Strieb *v.* Cox, 111 Ind. 299; Board *v.* Hill, 115 Ind. 316; City of New Albany *v.* McCulloch, 127 Ind. 500.

[6] Brashear *v.* City of Madison, 142 Ind. 685.

[7] Foland *v.* Town of Frankton, 142 Ind. 546; Crowder *v.* Town of Sullivan, 128 Ind. 486; City of Valparaiso *v.* Gardner, 97 Ind. 1.

property therein. This constitutional limitation on the power of municipalities to create debts has been construed by the supreme court of that state in several well considered cases. The limitation has been construed by that court to be a direct and positive prohibition on the power of municipalities to create debts in any manner or for any purpose in excess of the amount fixed by the constitution.[1]

It has been held in that state that the constitutional inhibition includes not only municipal bonds, but all forms of indebtedness, except warrants for money actually in the treasury, and perhaps contracts for ordinary expenses within the limits of current revenue.[2]

The purchaser of bonds issued by school districts is bound to take notice of the limitation in the constitution which forbids any political or municipal corporation to become indebted to an amount exceeding five per cent. of the taxable value of the property within their limits, and of the official assessment of the taxable property within the district.

This constitutional provision is an inhibition upon any indebtedness, no matter how it may be created. It applies to cases of implied contract, as well as express contract by bond, or otherwise.

§ 45. **Constitutional provisions of Kentucky construed.**— The constitution of Kentucky, which limits the indebtedness of cities of the first and second class to ten per cent. of their assessed valuation, but which authorizes cities whose indebtedness, on the adoption of the constitution, exceeded the prescribed limit, to increase it to an amount not exceeding two per cent. of the assessed valuation, permits cities to increase by two per centum of the assessed valuation, the aggregate indebtedness already authorized under the laws in force, though such existing indebtedness exceeds the ten per cent. limit.[3]

Section 157 of the constitution restricts the rate of taxation

[1] McPherson *v.* Foster, 43 Iowa 48, 22 Am. R. 215.

[2] Scott *v.* City of Davenport, 34 Iowa 208; McPherson *v.* Foster, 43 Iowa 48; Mosher *v.* School District, 44 Iowa 122; City of Council Bluffs *v.* Stewart, 51 Iowa 285.

[3] Holtzhauer *v.* City of Newport, 94 Ky. 396, 22 S. W. R. 752.

of cities and towns of less than ten thousand population to seventy-five cents on the hundred dollars and provides that no city, town, or municipality shall become indebted, "in any manner, or for any purpose," to an amount exceeding, in any year, the income and revenue of such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose. It was decided that such provisions applied to an indebtedness for school purposes as well as strictly municipal purposes.[1]

The provisions of the constitution limiting the tax rates of certain towns to a specified rate, and prohibiting such towns from incurring an indebtedness exceeding a specified amount, but allowing them to contract indebtedness in excess of such limitations, where authorized under laws in force before the adoption of the constitution, do not affect an indebtedness of a town created by a vote of its tax-payers before the constitution was adopted.[2]

The constitutional amendment providing that a city of the fourth class shall not incur an indebtedness exceeding five per cent. of its taxable value therein, took effect immediately on the adoption of the constitution; and, therefore, a contract by such city, incurring an indebtedness in excess of the five per cent. limit, made after the adoption of the constitution, but before the formal classification of the cities into classes by the general assembly, as required by the constitution, is void.[3]

And where a city contracts to pay a certain sum per year, for a given number of years, for water and electric lights, it "incurs an indebtedness," within the meaning of the constitution, for the total amount which the contract provides shall be paid during all the years it is to continue.[4]

A city which was authorized by its charter, prior to the adoption of the constitution, to contract an indebtedness for public improvement, may contract pursuant to such previous authority after the adoption of the constitution, or, at least,

[1] City of Richmond *v.* Powell (Ky.), 27 S. W. R. 1.

[2] Aydelett *v.* Town of South Louisville (Ky.), 26 S. W. R. 717.

[3] Beard *v.* City of Hopkinsville (Ky.), 24 S. W. R. 872.

[4] Beard *v.* City of Hopkinsville (Ky.), 24 S. W. R. 872.

until the legislature shall provide by general law for its government, though the indebtedness contracted exceeds the constitutional limit.[1]

§ 46. **Constitutional provisions of Missouri construed.**—The words "income and revenue provided for such year," in the constitution of Missouri providing that no county, city or town shall become indebted in any one year for a greater amount without the assent of two-thirds of the voters, means income derived from any source; and not that derived from taxation alone.[2]

In construing the constitutional provisions of Missouri declaring that no city shall incur indebtedness exceeding five per cent. of the value of its taxable property "to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness," it was held that an assessment can not be considered which has not passed the state board of equalization.[3]

A contract by a city to pay a fixed price annually for a water supply for twenty years, such payment to be contingent upon the supply being furnished, does not create an indebtedness on the part of the city within the meaning of the constitution limiting the amount of municipal indebtedness which may be created.[4]

So, under the constitution of that state providing that a city shall not incur an indebtedness exceeding five per cent. of the valuation of its property, it was held that where it contracts to pay a certain amount each year, for a number of years, for supplies to be furnished each year, the amount to become due thereunder in future years is not a part of its indebtedness.[5]

[1] Aydelett *v.* Town of South Louisville (Ky.), 26 S. W. R. 717; *Ex parte* City of Lexington (Ky.), 28 S. W. R. 665; City of Ludlow *v.* Board of Education (Ky.), 29 S. W. R. 854.

[2] Lamar Water & Electric Light Co. *v.* City of Lamar (Mo.), 26 S. W. R. 1025.

[3] Prickett *v.* City of Marceline, (C. C.) (Mo.), 65 Fed. R. 469.

[4] Saleno *v.* City of Neosho (Mo.), 30 S. W. R. 190.

[5] Lamar Water & Electric Light Co. *v.* City of Lamar 128 Mo. 188, 31 S. W. R. 756.

§ 47. **Constitutional provisions of Nebraska construed.**—In Nebraska the constitution is to be taken as restrictive only upon the exercise of legislative discretion in the authorization of county and municipal indebtedness in aid of railroads and other internal improvements. It fixes a boundary beyond which the legislature can not go, but within which its authority is still supreme. As the law stands there is no warrant for creating a county indebtedness, in aid of internal improvements exceeding in the aggregate ten per cent. of the assessed value of the taxable property within the county. And even this must be authorized by at least two-thirds of all the votes cast on the proposition to extend such aid. And hence, where a county votes aid to a railroad in excess of the amount authorized by law, it is simply a void act conferring no authority on the county commissioners to issue the bonds of the county in any amount whatever.[1]

The limitation upon county indebtedness imposed by the constitution relates solely to such as is created to aid in the construction of works of internal improvement. Thus, bridges built by a county upon the line of its highways and wholly within such county, are not "works of internal improvement," according to the constitutional meaning of that term; and money raised and expended therefor can not be counted as a donation to a work of internal improvement.[2]

§ 48. **Constitutional provisions of New York construed.**—Article 8, section 11, of the constitution of New York, as amended in 1885, provides that no city containing over one hundred thousand inhabitants, "shall be allowed to become indebted, for any purpose or in any manner, to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of its real estate." In construing this provision it was held that the water debt of the city of Brooklyn is to be counted in determining whether the limit of indebtedness of that city has been reached, notwithstanding the further provision of such section that it shall not

[1] Reineman *v.* C. C. & B. H. R. R. Co., 7 Neb. 310. People *v.* Buffalo Co., 4 Neb. 150; § 2, Art. 12, Const.

[2] DeClerq *v.* Hager, 12 Neb. 185;

be construed, "to prevent the issue of bonds to provide for the supply of water," because, though the city might, for water supply, incur debt in excess of the limit, it could not contract a debt in excess of the limit for any other purpose.[1]

The amendment also provides that "no county * * * or any such city shall be allowed to become indebted * * * to an amount which * * * shall exceed ten per centum of the assessed valuation of the real estate of such county or city subject to taxation." The supreme court in construing this provision decided that the city and county may each incur debts to the extent of ten per cent., of such value, though the lands in the city are charged with the debts of both the city and the county.[2]

The provision of the amended constitution of New York, which took effect January 1, 1895, declaring that "all indebtedness" incurred by any city in excess of the limitation imposed thereby, except such as may now exist, shall be absolutely void, does not apply to existing contracts by which a greater indebtedness will be incurred, the word "indebtedness" being used in the sense of "obligation."[3]

§ 49. **Constitutional provisions of Pennsylvania construed.** —Where a city purchases for its sinking fund a portion of its city loans, and they are no longer, as affects the city, a liability, the certificates so purchased, though not canceled are no part of the indebtedness of the city within the meaning of the constitution limiting the debts that a city may contract to seven per cent. of the assessed valuation of its taxable property therein.[4]

The constitution of Pennsylvania provides that no municipality shall secure a debt or increase its indebtedness to exceed a certain amount. In construing this clause of the constitution it was decided that the creation of such indebtedness is

[1] Adams *v.* East River Sav. Inst., 20 N. Y. Supp. 12, 64 Hun 635, 65 Hun 145.

[2] Adams *v.* East River Sav. Inst., 20 N. Y. Supp. 12, 64 Hun 635, 65 Hun 145.

[3] Sheenan *v.* Treasurer of Long Island City, 33 N. Y. S. 428, 11 Misc. R. 487.

[4] Brooke *v.* City of Philadelphia, 162 Pa. St. 123, 29 A. 387, 34 W. N. C. 341.

forbidden though the contract from which it arises is to be performed in the future, if the present indebtedness equals the constitutional limit, unless the annual revenues will be sufficient to meet the obligations incurred at the time they are to be performed.[1]

An annual sum, to be paid monthly, for lighting streets for a limited term, is not the incurring of a new indebtedness, within the meaning of the constitution of Pennsylvania and the act of 1874, restricting municipal indebtedness to two per cent., of the last assessed valuation.[2]

But the two per cent. limit imposed by the constitution upon the increase of municipal indebtedness, without the assent of the voters, can not be exceeded by successive additions, each less than two per cent.[3]

§ 50. **Limitation of indebtedness under the South Carolina constitution.**—It has been held that the charter of a municipal corporation, permitting it to issue bonds in aid of the construction of railroads to any amount, is not in conflict with the constitution of South Carolina limiting the indebtedness of municipal corporations to eight per cent. of their taxable property, since the provision of the charter will be held to operate only within the constitutional limit.[4]

§ 51. **Limitation of indebtedness under the Texas constitution.**—The constitution of Texas provides that no city shall ever incur a debt for any purpose or in any manner, unless at the same time provision is made for the levying and collecting of a tax sufficient to pay the interest, and the sinking fund of at least two per cent. per annum. The constitution also provides that the tax to be levied for the erection of public buildings and other permanent improvements shall not exceed twenty-five cents on the hundred dollar valuation in any one year. It was held by the United States circuit court of appeals that the power of a city to create debts for such pur-

[1] Nankivil *v.* Yeosock, (Pa.) 7 Kulp 518.

[2] Wade *v.* Borough of Oakmont, 165 Pa. St. 479, 30 A. 959.

[3] Pepper *v.* Philadelphia, 181 Pa. St. 566, 37 Atl. R. 579.

[4] Town of Darlington *v.* Atlantic Trust Co., 68 Fed. R. 849.

poses is limited to a sum upon which the interest, together with two per cent. for the sinking fund, will not exceed the revenue derived from the tax of twenty-five cents on the hundred dollars.[1]

§ 52. **Limitation on the creation of debts by providing for interest and sinking fund.**—A contract whereby a city agrees to pay a certain sum for the erection of a bridge, one-half on the delivery of the material, and the remainder on completion and acceptance of the bridge, creates a debt within the provisions of the constitution of Texas, which provides that no city shall create any debt unless at the same time provision is made by taxation for payment of its interest and creation of a sinking fund, and is, therefore, invalid if no such provision is made at the time of its execution, notwithstanding payment of the contract price is secured by the proceeds, paid into the city treasury, or bonds issued for the purpose, in accordance with the provisions of a city charter requiring creation of a fund for payment of interest and as a sinking fund by special tax. Neither can the debt created by such contract be regarded as a current expense of the city, payable out of the current revenues. And where such contract is void, as contravening the provisions of the constitution, the contractors can not recover from the city the value of the bridge, as upon an implied contract.[2]

§ 53. **Constitutional provisions of West Virginia construed.**—The constitution of West Virginia provides that, "No county, city, school district or municipal corporation shall hereafter be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness."

[1] Millsaps *v.* City of Terrell, 60 Fed. R. 193; Francis *v.* Howard Co., 50 Fed. R. 44; City of Terrell *v.* Dissaint (Tex.), 9 S. W. R. 593; Nolan Co. *v.* State (Tex.), 17 S. W. R. 823.

[2] Berlin Iron Bridge Co. *v.* City of San Antonio, 62 Fed. R. 882.

In construing this constitutional provision the supreme court of appeals of West Virginia held that it applies to any debt created by contract, express or implied; any voluntary incurring of any liability to pay in any manner or for any purpose when the given limit of indebtedness has been reached. It may be a debt payable in the future as well as one payable presently; one payable upon some contingency, such as the delivery of property as well as for property already delivered. When the contingency happens the debt becomes fixed. It exists. It only differs from an unqualified promise in the manner in which it is created. And since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else. Thus, where a city was indebted up to the limit fixed by the constitution it can not carry on its operations on credit within the meaning of credit in the constitution, in any manner or for any purpose, but must pay during the current year with funds in hand, or with funds already legally levied. And a city thus indebted can not increase its indebtedness beyond the constitutional limit by contracting for an electric apparatus and plant, and such indebtedness being forbidden, a contract out of which it arises, although executory, is also forbidden. The end aimed at is prohibited, which carries with it the prohibition of the means directly and appropriately designed and adapted for its accomplishment. After reviewing numerous authorities, the learned court said: "The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution to carry on the corporate operations while so indebted upon the cash system and not upon credit to any extent and for any purpose."[1]

§ 54. **Constitutional provisions of Montana, Wyoming and Wisconsin construed.**—Where, in defense to an action to enjoin the city from carrying out a contract for paving, on the

[1] Spilman *v.* City of Parkersburg, 35 W. Va. 605; List *v.* City of Wheeling, 7 W. Va. 501; Brannon *v.* County Court, 33 W. Va. 789; 11 S. E. R. 34; County Court *v.* Boreman, 34 W. Va. 362, 12 S. E. R. 490.

ground that it is in violation of the constitution of Montana, limiting the indebtedness of a city, defendants set up that the cost of the paving is payable out of a special fund assessed against the abutting land, and does not constitute a liability of the city, defendants must show that proper steps have been taken to assess the abutting land for the paving, and that the contractor has expressly agreed to accept the fund raised by such assessment, and has waived all right to hold the city liable for the cost of paving.[1]

The refunding of the bonded indebtedness of a school district is not the creation of a debt within the provisions of the constitution of Wyoming, providing that no debt in excess of the taxes of the current year shall be created by any municipality, unless the proposition shall have been submitted to and approved by a vote of the people thereof.[2]

Constitutional and statutory restrictions upon the amount of bonded indebtedness which a school district or other municipality may incur are inapplicable to bonded debts created before the passage of any restrictions as to such indebtedness.[3]

Where improvement bonds of a city declared that it "acknowledges itself indebted to, and promises to pay the bearer hereof the sum of ——— dollars, lawful money of the United States," and that they were made payable out of the proceeds of the improvement assessment chargeable on the property benefited, and that they were issued on the faith and security of such assessments, it was held that the city was bound absolutely for the payment of the bonds, though it might be reimbursed from the payment of the improvement assessments, and that they constituted municipal indebtedness, within the meaning of the constitution of Wisconsin, prohibiting a municipality from incurring an indebtedness exceeding five per cent. of the value of the taxable property therein.[4]

[1] Atkinson *v.* City of Great Falls 16 Mont. 372, 40 Pac. R. 877.

[2] Miller *v.* School District No. 3 in Carbon Co., 5 Wyo. 217, 39 Pac. R. 879. Nor is the refunding of old city bonds by new ones the creation of any new indebtedness within the prohibition in Montana. Palmer *v.* City of Helena, 19 Mont. 61, 47 Pac. R. 209.

[3] Miller *v.* School District No. 3 in Carbon Co., 5 Wyo. 217, 39 Pac. R. 879.

[4] Fowler *v.* City of Superior, 85 Wis. 411, 54 N. W. R. 800. But see *post*, §§ 64, 65.

§ 55. **Constitutional provisions of Washington construed.** —The provision of the constitution of Washington, that no county shall become indebted in any manner to an amount exceeding one and one-half per cent. of the taxable property in such county without the assent of three-fifths of the voters therein, does not authorize the county commissioners to incur an indebtedness up to one and one-half per cent. in addition to any indebtedness which may have been incurred before such provision took effect. Nor does such provision authorize the commissioners to submit to the people the question of validating any purported indebtedness they had attempted to incur in excess of the constitutional limit.[1]

Where the constitution provided that any indebtedness contracted strictly for municipal purposes, and now owing by any city organized prior to the adoption of the constitution, is hereby validated and declared a binding obligation upon the city, when the only ground of its invalidity is that it exceeds the amount authorized by the charter, and provided in a further clause that there must be a popular vote if the excess reached beyond one and one-half per cent. of the taxable property of the city, it was held that where a city has done an act beyond its statutory powers, but within the powers which it is competent for the legislature to confer upon it, the act may be validated by a curative statute.[2]

Where the charter of a city authorized the city council to issue local improvement bonds, and contained a provision that they shall be paid for by the city from the proceeds of the assessment in the improvement districts, "and the city shall be liable for the payment of both principal and interest, * * *" it was held that such bonds, when issued, will constitute a part of the city's general and primary indebtedness, and an ordinance attempting to make it liable only in the event of the failure to collect the assessments is invalid; and the bonds can not be issued when the amount would increase the debt of such city in violation of the constitutional provision forbidding any city to become indebted to an amount exceeding one

[1] Rehmke *v.* Goodwin, 2 Wash. 676, 27 Pac. R. 473.

[2] Baker *v.* City of Seattle, 2 Wash. 576, 27 Pac. R. 462.

and one-half per cent. of its taxable property, except by the consent of three-fifths of its voters.[1]

Under the constitution of Washington, which ordains that no city shall "for any purpose" become indebted "in any manner" to an amount exceeding one and one-half per cent. of the taxable property without the assent of three-fifths of its voters, it has been held that the indebtedness for water and sewerage purposes is no part of the general indebtedness of the city and need not be considered in determining whether the city has already reached the constitutional limitation of general indebtedness.[2]

The constitutional provision against a city incurring any indebtedness in excess of one and one-half per cent. of the value of the taxable property within its limits, is not the source of the city's power to incur indebtedness but a limitation on such power. And, hence, a newly incorporated city has the power to incur indebtedness before the value of its taxable property is ascertained, the presumption being that it is acting properly in so doing. The fact that after the valuation of property is taken by county officers a portion thereof is segregated from the balance of the county by the incorporation of a city does not prevent the valuation of the property so segregated from being the basis on which to estimate the limit on the city's indebtedness until the regular city assessment for the succeeding year is completed and becomes effective. Where a liability is incurred by a city when its total indebtedness, including such liability, is within the constitutional limit, the fact that a subsequent valuation of the city's property for taxation reduces the former valuation so as to increase the city's debt beyond the limit will not invalidate warrants thereafter issued to evidence such liability.[3]

[1] Austin *v.* City of Seattle, 2 Wash. 667, 27 Pac. R. 557. But it is otherwise where the bonds are payable only out of the assessment. Baker *v.* Seattle, 2 Wash. 576, 27 Pac. R. 462. The city may, however, be liable where it negligently fails to provide the fund. Bank *v.* Port Townsend, 16 Wash. 450. But see German, etc., Bank *v.* City of Spokane, 17 Wash. 313, 49 Pac. R. 542.

[2] Austin *v.* City of Seattle, 27 Pac. R. 557.

[3] Childs *v.* City of Anacortes, 5 Wash. 452, 32 Pac. R. 217.

§ 56. **The term "indebtedness" defined.**—In a well-considered case the supreme court of Indiana reviewed all the Iowa and Illinois cases, and many others, and defined "indebtedness" as follows: "By 'indebtedness' in this connection, we mean an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement. It was obviously the intention of the legislature in submitting, and of the people in adopting, the thirteenth article of the constitution, to arbitrarily restrict the power of municipal corporations to contract debts to a limited per centum of their taxable property, and to require, when that limit of indebtedness has been reached, that such corporation shall be prepared to pay for whatever value they may obtain without the incurring of any further indebtedness for any purpose whatever."[1]

The supreme court of appeals of West Virginia has defined the term "indebtedness" as follows: "By the term 'indebtedness' as here used, is meant the state of being by voluntary obligation, express or implied, under the legal liability to pay in the present, or at some future time, for something already received, or for something yet to be furnished or rendered. This includes every kind of indebtedness, no matter in what manner created, or voluntarily brought about, or for what purpose; whether it be for municipal self preservation or not; whether for pure air, pure water, good light, clean and convenient and safe streets and sidewalks; whether it be payable now or hereafter, payable quarterly or annually, or at any date running on for thirty-four years; whether for current expenses or fixed and definite debts and charges; whether for personal property, real property, leasehold or freehold. It is none the less indebtedness, created in some manner and for

[1] Sackett *v.* City of New Albany, 88 Ind. 473; 2 Am. and Eng. Corp. Cases, 85; 45 Am. R. 467. See, also, Mitchell County *v.* City Nat. Bank (Tex.), 43 S. W. R. 880; Burnham *v.* City of Milwaukee (Wis.), 73 N. W. R. 1018. A debt denotes not only the obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. State *v.* Hawes, 112 Ind. 323; Crowder *v.* Town of Sullivan, 128 Ind. 486.

some purpose, and is within the provision and the bar of the constitution.'"[1]

§ 57. **As to the time the debt is incurred.**—Where a municipal corporation enters into a contract to pay a sum of money when certain work shall be done and accepted, the obligation thereby assumed will constitute a debt, within the meaning of the constitutional limitation of its power to incur indebtedness. Such indebtedness will be regarded as having been incurred from the date of the contract, and not postponed to the time of the completion and acceptance of the work.[2]

§ 58. **What is essential to the creation of debt.**—It is essential to the idea of a debt that an obligation should have arisen out of a contract, express or implied, which entitles the holder thereof unconditionally to receive from the promisor a sum of money which the latter is under a legal or moral duty to pay without regard to any future contingency. Hence, assessments for street improvements and the like are upheld on the ground that adjacent property upon which the cost of improvement is assessed is enhanced in value to an amount equal to the sum assessed against it, and that the owners have received peculiar benefits which the citizens do not share in common. The municipality, as such, is not benefited by the improvement, and there is, therefore, under the law, neither legal nor moral obligation to pay. The moral and legal duty of the city to pay depends upon the contingency or condition of the special fund out of which payment is to be made. If the officers of the city discharge the duties devolved upon them by the statute, their

[1] Spilman *v.* City of Parkersburg, 35 W. Va. 605, 14 S. E. R. 279. But it is held that indebtedness includes only the face of the outstanding obligation and not future interest. City of Ashland *v.* Culbertson (Ky.), 44 S. W. R. 411. For further explanations of this term see Keihl *v.* City of South Bend, 76 Fed. R. 921; Beard *v.* City of Hopkinsville, 95 Ky. 239, 44 Am. St. R. 222, and note, and 23 L. R. A. 402, and note.

[2] Culbertson *v.* City of Fulton, 127 Ill. 30; Thomson-Houston Co. *v.* Newton, 42 Fed. R. 723. But see Keihl *v.* City of South Bend, 76 Fed. R. 921. As elsewhere shown, however, this rule, in many instances, does not apply to a contract to pay water rental for a long period in installments where there is no debt until the money is earned.

power over the subject is exhausted. They are not authorized to create an indebtedness against the city as such.[1]

§ 59. **Implied power to incur indebtedness.** — Where the constitution of the state provides that no municipal corporation shall become indebted in any manner or for any purpose beyond a certain per centum of its taxable property, the prohibition is as effectual against implied as well as express indebtedness, and is as binding in equity as at law.[2]

§ 60. **Manner of ascertaining the value of taxable property as basis of indebtedness.**—By the Iowa constitution the limit of indebtedness is fixed by reference to the last state and county "tax list." Thus where the assessment roll for the current year had been filed with the county auditor, having been equalized by the county board of equalization prior thereto, and the tax lists themselves were not completed until after the voting of the bonds, it was held by the supreme court that the validity of the vote was to be determined by the tax list of the preceding year, although the assessment rolls had been made up previous to the vote.[3]

It is the assessment as finally fixed by the state board of equalization that must govern in determining the basis of the limitation of the power to create municipal indebtedness. Thus, a city contracted for the construction of water-works in August, 1887, by which it was to pay for the works when completed and accepted, the sum of $11,619. The equalized value of the taxable property in the city was not fixed until October 1, 1887. It was held by the supreme court of Illinois,

[1] Quill *v.* City of Indianapolis, 124 Ind. 292; Sackett *v.* City of New Albany, 88 Ind. 473; City of New Albany *v.* McCulloch, 127 Ind. 500, 505; City of Valparaiso *v.* Gardner, 97 Ind. 1; Comrs. *v.* Jackson, 165 Ill. 17; City of Clinton *v.* Walliker, 98 Iowa 655, 68 N. W. R. 431; City of Galveston *v.* Heard, 54 Tex. 420; Baker *v.* Seattle, 2 Wash. 576, 27 Pac. R. 462; Davis *v.* City of Des Moines, 71 Iowa 500. But where the enabling statute evidently intends bonds to be general obligations of the municipality, they will be so considered, even though, for additional security, they are made a lien upon a specific fund. Woodbridge *v.* City of Duluth, 57 Minn. 256, 59 N. W. R. 296.

[2] Litchfield *v.* Ballou, 114 U. S. 190.

[3] Wilkinson *v.* Van Orman, 70 Iowa 230.

that the valuation of the property for the year 1886 governed as to the limitation of the amount of corporate indebtedness allowed to be incurred, and the valuation for that year being $209,061, the city was prohibited from incurring any greater indebtedness than $10,453.05, being five per cent. upon the preceding year's assessment, and that the debt in excess of that sum, being $1,165.95, was void, but up to $10,453.05 was valid and enforcible.[1]

In a city in Nebraska, where the assessed valuation for the year 1887 was $190,493, and in June, 1888, the council of the city submitted to the voters thereof a proposition to issue $20,000 in bonds, to construct water-works, the taxes being limited to seven mills on the dollar for the assessed valuation, the election was held on the 6th day of July, 1888, the necessary majority being in favor of the issuance of the bonds, but at the time of the election the valuation of property in the city, as returned by the assessor, was reduced to $158,541. It was held by the supreme court of that state that the issue of $20,000 in bonds was in excess of the power conferred, and that such bonds were unauthorized.

Mr. Justice Maxwell, delivering the opinion of the court, said: "The taxes for such bonds are to be based upon the assessment at the time the bonds are issued. In a new state like this, where as a general rule, property is constantly advancing in value, it can not be supposed that the legislature in passing the act in question intended to permit the issue of bonds, the interest on which should exceed seven mills on the dollar valuation. The evident purpose was to prevent the imposition of a burdensome tax. As the bonds were issued under statutory power, the statute is the measure of authority of the city council in the premises. The fact that the proposition was based upon the assessment of 1887 and considered valid, we submit does not aid the relator, as at the time of the election the assessed valuation did not justify the city in issuing the amount of bonds then fixed upon. The amount of bonds

[1] Culbertson *v.* City of Fulton, 127 Ill. 30; McPherson *v.* Foster Bros., 43 Iowa 48; Stockdale *v.* Wayland School District, 47 Mich. 226; Mix *v.* People, 72 Ill. 241.

to be issued is to be determined by the assessed valuation at the time of the election."[1]

The supreme court of the United States, in construing the constitutional provision of Nebraska, limiting municipal indebtedness in a case in which the validity of certain bonds were drawn in question, declared that: "In determining the limited power there were necessarily two factors, the amount of the bonds to be issued, and the amount of the assessed value of the property for purpose of taxation. * * * * * * * No recital involving the amount of the assessed value of taxes of the property to be assessed for the payment of the bonds can take the place of the assessment itself, for it is the amount as fixed by reference to that record that is made by the constitution the standard for measuring the limit of municipal power."[2]

In construing the constitutional provision of Illinois as to the manner of determining the amount of taxable property as a basis of creating indebtedness, the supreme court of the United States held that "in determining whether the constitutional limit of indebtedness has been exceeded by a municipal corporation, an inquiry would always be necessary as to the amount of the taxable property within its boundaries. Such inquiry would be solved, not by information derived from individual officers of the municipality, but only in the mode prescribed in the constitution; that is, by reference to the last assessment for state and county taxes for the year preceding the issuing of the bonds. The purchaser of the bonds was certainly bound to take notice not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city."[3]

In construing the limitation found in the constitution of Colorado, the supreme court of the United States declared that "the standard of validity is created by the constitution. In

[1] State *v.* Babcock, 20 Neb. 522; State *v.* Babcock, 24 Neb. 642.

[2] Dixon Co. *v.* Field, 111 U. S. 83; Doon Tp. *v.* Cummins, 142 U. S. 366; Sutliff *v.* Commissioners, 147 U. S. 230.

[3] Buchanan *v.* Litchfield, 102 U. S. 278.

that standard two factors are to be considered, one the amount of the assessed value, and the other the ratio between the assessed value and the debt proposed. These being exactions from the constitution itself, it is not within the power of the legislature to dispense with them, either directly or indirectly.''[1]

§ 61. **Ascertaining the amount of indebtedness.**—In ascertaining the amount of indebtedness which may be created by a municipality within the meaning of the constitutional provision, bonds issued in aid of a railroad are to be included among its liabilities.

Thus, in Texas, where the amount of bonds which a city is authorized to issue to pay off its existing indebtedness incurred in making public improvements, erecting buildings, improving streets, etc., is limited to six per cent. of the value of the city's taxable property, in ascertaining the amount of bonds outstanding, those issued in aid of a railroad are to be included, and the sum of money in the city treasury applicable to the bonds could not properly be deducted.[2]

Where the constitution of the state provides that no city, county, town or precinct, municipality or other subdivision of the state shall ever make donations to any railroad or other work of internal improvement, unless a proposition so to do shall have first been submitted to the qualified electors thereof at an election by authority of law, with a proviso that such donations of a county, with the donations of such subdivisions in the aggregate, shall not exceed ten per cent. of the assessed valuation of such county, it is held that in ascertaining the amount of donations already made by a county, including its subdivisions, to railroads or other works of internal improvement, for the purpose of seeing whether another proposed donation, aggregated with those already made, would be within the statutory and constitutional limit of ten per cent. of the

[1] Lake Co. *v.* Rollins, 130 U. S. 662; Lake Co. *v.* Graham, 130 U. S. 674; Doon Tp. *v.* Cummins, 142 U. S. 366.

[2] City of Waxahachie *v.* Brown, 67 Tex. 519; 17 Am. & Eng. Corp. Cases, 348. But see note 5, *infra*.

assessed valuation of the county, *unpaid interest* due on such previous donations should not be considered.[1]

But uncollected taxes and special assessments may be regarded as available for current expenses up to the time of the annual tax-sale, although after that time the city must prove that they have no value before they will be included in determining the power of the city to make a contract for necessary supplies.[2]

Interest coupons attached to municipal bonds do not form part of the principal debt so as to invalidate the bonds as issued in violation of a constitutional provision prohibiting an indebtedness in excess of five per cent. of the valuation of the taxable property therein.[3]

The constitutional limitation is aimed at an actual and real indebtedness and not a merely apparent and theoretical one, and where a sinking fund is provided which can only be devoted to the payment of outstanding bonds, such fund including bonds therein, which have been purchased or redeemed, even though they have not been formerly canceled, should not be considered as part of the actual indebtedness,[4] and it has even been held that such bonds and money in the sinking fund should be deducted from the total amount of outstanding bonds.[5]

§ 62. **Limitations upon the power to issue bonds for public improvements.**—The constitution of Illinois forbids any municipal corporation to become indebted, in any manner or for any purpose, to an amount exceeding five per centum on the

[1] Jones *v.* Hurlburt, 13 Neb. 125; State *v.* Lancaster Co., 6 Neb. 214; Monadnock R. R. Co. *v.* Peterborough, 49 N. H. 281; Town of Weyauwega *v.* Ayling, 99 U. S. 112.

[2] City of Council Bluffs *v.* Stewart, 51 Iowa 385; French *v.* City of Burlington, 42 Iowa 614.

[3] Durant *v.* Iowa Co., 1 Woolw. (C. C.) 69, 8 Fed. Cases 117, per Miller, J.

[4] Bank *v.* Grace, 102 N. Y. 313, 7 N. E. R. 162; Brooke *v.* City of Philadelphia, 162 Pa. St. 123, 29 Atl. R. 387.

[5] Kelly *v.* City of Minneapolis, 63 Minn. 125, 65 N. W. R. 115. But see City of Waxahachie *v.* Brown, 67 Tex. 519, 4 S. W. R. 207; Elser *v.* City of Ft. Worth, —— Tex. ——, 27 S. W. R. 739; Montague *v.* English, 119 Cal. 225, 51 Pac. R. 327; Weaver *v.* San Francisco, 111 Cal. 319, 43 Pac. R. 972. The amount of cash on hand and available assets should be subtracted. Crogster *v.* Bayfield County (Wis.), 74 N. W. R. 635.

value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Thus, a city indebted beyond the constitutional limit entered into a contract for lighting its street at a certain price, payable monthly in warrants on the fund appropriated for that purpose. In construing this contract it was held that warrants drawn on the treasurer for gas furnished before the levy of the tax were illegal; but otherwise as to gas furnished after the levy, the city having the right to pay for it at the contract price.[1]

In defining what constituted an indebtedness within the meaning of the constitutional provision of that state the court has held that if a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute, the debt exists and it differs from a present unqualified promise to pay only in the manner by which the indebtedness was incurred. And since the purpose of the debt is expressly excluded from consideration, it makes no difference whether the debt be for necessary current expenses, or for something else.[2]

Thus, the city of Quincy, by an ordinance, entered into a contract with Edward Prince for the erection of water-works within its corporate limits, agreeing to pay an annual sum for the use of water to extinguish fires, and a further annual sum for each fire hydrant used by the city. The water-works were constructed in accordance with the requirements of the ordinance, and the terms of the agreement were mutually observed for several years, when the city, assuming that the contract had been entered into on its part without competent authority, declined further compliance with the terms of the contract, and so notified Prince. This resulted in a suit by Prince against the city for damages for breach of the contract. The city pleaded in bar of the action that at the time of the making of the contract with Prince it was, and ever since has continued to be, indebted in an aggregate sum of more than five per cent. of the value of its taxable property. To that Prince re-

[1] City of East St. Louis *v.* Flannigan, 26 Ill. App. 449.

[2] City of Springfield *v.* Edwards, 84 Ill. 626; Law *v.* People, 87 Ill. 385.

plied that the several sums of money stipulated to be paid by the city pertained to the ordinary expenses of the government and the administration of its municipal affairs; that said several sums of money, when taken together with the other expenses necessarily incurred in carrying on the city government, were within the limits of the current expense of the city. Whether the defense to the action was well taken depended upon the construction to be given to section 12, of article 9, of the constitution which ordains that "no county, city, township, school district or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." While the provision of the constitution just cited declares, in clear and emphatic terms, that a city or other municipality whose existing indebtedness already exceeded the constitutional limit, as in the case at bar, shall not become further indebted "in any manner or for any purpose," it was seriously contended by counsel for appellant that, notwithstanding such indebtedness was beyond the constitutional limit, under the peculiar circumstances of the municipality, it might become indebted for supplies to meet its ordinary wants and necessities. The court held to so construe the constitution would be to add a provision, in the nature of an exception to the constitution, which the framers of that instrument did not see proper to insert. That is not permissible, as is well settled by an unbroken current of authorities, where the language of the law is clear and unambiguous, as in the case under consideration, except where to give effect to the language used according to its literal terms would lead to a gross absurdity or manifest wrong or inconsistency, which courts will not impute to legislative bodies. That such consequences will flow from the giving effect to this provision of the constitution according to the obvious meaning of the language in which it is conceived will hardly be claimed by any one. The object and purpose of the framers of the constitution

in adopting this provision, said the court, have, on more than one occasion, received the deliberate and mature consideration of this court, and we do not feel called upon to repeat what we have already said upon the subject, but will content ourselves with a reference to the cases containing the previously expressed views of this court in relation to it.[1]

The issue of bonds by a city for the purpose of erecting public improvements, such as water-works, from which it is expected the city will derive a revenue, has been held in Iowa to be an indebtedness within the meaning of the constitutional prohibition, notwithstanding the city will acquire valuable property which will be equal to the amount of the loss and productive of revenue. Chief Justice Miller, speaking for the court, said: "The fact that the property for which the debt is contracted is valuable and a source of profit or revenue does not remove or change the character of the indebtedness. The purchaser, having become bound to pay, has incurred an indebtedness which he may be compelled to pay. Being thus bound he is in debt, no matter what amount of property he may have received in consideration for his obligation. He has become indebted for its purchase."[2]

And if the indebtedness has reached the limit the city can not enter into an agreement to pay a stated sum as rent for a market-house, if its annual revenues are insufficient over and above the interest of its indebtedness and the ordinary expenses of the city to meet the rent proposed to be paid. Thus, the constitution of Pennsylvania provides that the debt of any city shall never exceed a fixed limit. The city of Erie, after its debt had reached that limit, made a contract for the erection of a market-house for the use of the city, for which the city was to pay the owner an annual rent calculated at six per cent. on the cost of the building and the value of the land for a period of twenty-five years, during which the city had liberty to purchase the property. This contract was held to create a debt within the meaning of the constitutional prohibition.[3]

[1] Prince *v.* City of Quincy, 105 Ill. 138, 44 Am. R. 785; City of Springfield *v.* Edwards, 84 Ill. 626; Law *v.* People, 87 Ill. 385.

[2] Scott *v.* Davenport, 34 Iowa 208; Freeman *v.* Burlington, 42 Iowa 614.

[3] Appeal of City of Erie, 91 Pa. St. 398.

In Wisconsin it has been held that under section 3, article 11, of the state constitution, where a city is already indebted in a sum exceeding five per centum of the value of the taxable property therein, it can not incur a further indebtedness for building a court-house or for any other purpose, and a tax levied to pay such further indebtedness is void.[1]

A contract in California for the construction of a wagon-road where the indebtedness had reached the constitutional limit was held to be invalid.[2]

So, in Missouri, a contract for remodeling and building additions to a court-house, where the indebtedness was equal to the amount permitted by the limitation of the constitution, was held invalid.[3]

The constitution of Maryland contains a provision that "no debt shall be created by the mayor and city council of Baltimore," unless it shall be first sanctioned by the legislature and approved by the voters of the city. The city, being the owner of a large amount of stock in the Baltimore and Ohio Railroad Company, without previous legislative authority or the approval of the voters passed an ordinance to provide for the raising of one million dollars by hypothecating its railroad stock, and for the investment of the same in the bonds of another railroad company whose road was in process of contruction. The validity of this ordinance being drawn in question, the court considered it to be plain that the constitutional provision quoted was intended to prohibit the city from aiding in the construction of works of internal improvement without the previous assent of the legislature, and of a majority of the voters of the city; and that the ordinance (notwithstanding the ingenious use of the phrase raising instead of borrowing money, and the further provision that the parties furnishing the money should look for its repayment exclusively to the stock pledged, and that the city should not be responsible for any deficit) did create a debt within the meaning of the constitution, and was, therefore, void."[4]

[1] Hebard *v.* Ashland Co., 55 Wis. 145.

[2] People *v.* Johnson, 6 Cal. 499.

[3] Book *v.* Earl, 87 Mo. 246.

[4] Baltimore *v.* Gill, 31 Md. 375.

The law of Texas authorizing the issue of bonds to build a court-house, which declares that the county shall not issue a larger number of bonds than can be liquidated in ten years by an annual tax of one-fourth per cent. upon the taxable property in the county, has been held a limitation upon the section which authorizes the issue of such bonds "in such amount as may be necessary."[1]

The establishment by the city of a water department for the supply of water to the city and its inhabitants is a "city purpose" within the meaning of a constitutional provision of New York that "no city, town or village shall be allowed to incur any indebtedness except for county, city, town or village purposes."[2]

A section of the act "to establish and maintain a water department in and for the city of Syracuse" provided for the issuance of bonds by the city of Syracuse in aid of the establishment and maintenance of a water department, and made the bonds payable more than twenty years from the date of the issue, but provided for no sinking fund for their retirement at maturity. It was held that such section was not in violation of the constitution of New York, which provides that "no county containing a city of over one hundred thousand inhabitants, or any such city, shall be allowed to become indebted to an amount, which, including existing indebtedness, shall exceed ten per cent. of the assessed valuation of the real estate subject to taxation," and that such section "shall not be construed to prevent the issue of bonds to provide for the supply of water, but the terms of "such bonds" shall not exceed twenty years, and a sinking fund shall be created on the issuance of such bonds for their redemption," it not affirmatively appearing that Syracuse contained more than one hundred thousand inhabitants and that its existing indebtedness exceeded ten per centum of the assessed valuation of its real estate subject to taxation.[3]

[1] Francis *v.* Howard Co., 50 Fed. R. 44; Russell *v.* Cage, 66 Tex. 428, 1 S. W. R. 270; Holland Co. *v.* State, 17 S. W. R. 826.

[2] Comstock *v.* City of Syracuse, 5 N. Y. Supp. 874.

[3] Comstock *v.* City of Syracuse, 5 N. Y. Supp. 874.

The construction and operation by a city of a plant for the supply of an electric light to the city and its inhabitants is a city purpose within the meaning of the constitution of New York prohibiting cities from incurring indebtedness except for city purposes.[1]

§ 63. **Limitation of indebtedness for water and light by payment in yearly installments.**—Where a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments, since the debt for each year does not come into existence until the compensation for each year has been earned.[2]

Justice Elliott, delivering the opinion of the court in this case, uses the following language: "If municipal corporations can not contract for a long period of time for such things as light and water, the result would be disastrous, for it is matter of common knowledge that it requires a large outlay of money to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expense for such machinery and appliances if only short periods are allowed to be provided for by contract. The courts can not presume that the legislature meant to so cripple the municipalities of the state as to prevent them from securing light upon reasonable terms, and in the ordinary mode in which such a thing as electric light or gas is obtained. But it is unnecessary to discuss this point at greater length, for we regard the law upon it as settled by the adjudged cases."[3]

The necessity for water-works constitutes no justification or

[1] Hequembourg *v.* City of Dunkirk, 2 N. Y. Supp. 447.

[2] Crowder *v.* Town of Sullivan, 128 Ind. 487–8.

[3] Crowder *v.* Town of Sullivan, 128 Ind. 486; City of Valparaiso *v.* Gardner, 97 Ind. 1, and authorities cited; City of New Albany *v.* McCulloch, 127 Ind. 500; City of East St. Louis *v.* East St. Louis, 98 Ill. 415; Budd *v.* Budd, 59 Fed. R. 735; Appeal of City of Erie, 91 Pa. St. 398; Grant *v.* City of Davenport, 36 Iowa 396; Lamar Water, etc., Co. *v.* City of Lamar, 140 Mo. 145, 39 S. W. R. 768; Stedman *v.* City of Berlin, — Wis. —, 73 N. W. R. 57.

excuse for the violation of a constitutional or statutory prohibition. But it has been held that a contract entered into by a city for the supply of water for a term of years at a fixed annual rate is one relating to the ordinary expenses of the city, and the rate agreed to be paid is not an indebtedness prohibited by the constitution.[1]

Where a city ordinance in Iowa authorizes the construction of water-works within a city, and provides that the city shall have the right, when its financial condition may permit, to purchase the works, this is not an incurring of indebtedness within the provisions of the constitution.[2]

In Illinois it has been held that if a city enters into a contract for lighting its streets for a term of years, the agreed price therefor to be paid monthly, and the sum payable in any one year is not in excess of the limitation, the contract is not prohibited, although the sum payable during the whole term may be in excess of the authorized amount of indebtedness within the meaning of the constitutional limitation.[3]

[1] Grant *v.* Davenport, 36 Iowa 396; Creston Waterworks Co. *v.* City of Creston, 101 Iowa 687, 70 N.W. R. 739; Utica *v.* Utica Water Co., 31 Hun (N. Y.) 426.

[2] Burlington Water Co. *v.* Woodward, 49 Iowa 58. So, in Wisconsin, Stedman *v.* City of Berlin, — Wis. —, 73 N. W. R. 57.

[3] East St. Louis *v.* East St. Louis G. L. & C. Co., 98 Ill. 415, 38 Am. R. 97. In Prince *v.* Quincy, 105 Ill. 138, 2 Am. & Eng. Corp. Cases, 66, and 44 Am. R. 785, this case is referred to. The court said: "That was a suit for gas, and in answer to the claim that the city had already under this provision of the constitution exhausted its power to contract corporate indebtedness, it is distinctly stated in the opinion in that case that it did not affirmatively appear that at the time the gas was furnished the city was indebted beyond the constitutional limit and, hence, a recovery was permitted." Where the price of five hydrants, which the city agreed to purchase from a water-works company, was to be paid in annual installments during the period of twenty-one years, the fact that the entire purchase-price exceeded the city's limit of indebtedness has been held not to render the contract void, because it did not create a present indebtedness at the time the contract was made, and no appropriation was necessary at the time of the execution of the contract or before entering into the same. Carlyle Water, Light and Power Co. *v.* City of Carlyle, 31 Ill. App. 325. But where there is a purchase, the price to be paid in installments, the general rule is that an indebtedness is at once incurred to the full amount. Brown *v.* Corry, 175 Pa. St. 528, 34 Atl. R. 854; Earles *v.* Wells, 94 Wis. 285, 68 N. W. R. 964; Ironwood Waterworks Co. *v.* Trebilcock, 99 Mich. 454, 58 N. W. R. 371. See, also, Trump, etc., Co. *v.* Village of Buchanan (Mich.), 74 N.W. R. 466.

§ 64. **Limitation of indebtedness as to street improvement bonds or certificates.**—Bonds or certificates issued under the provisions of the act of March 8, 1889, of the laws of Indiana, entitled "An act concerning powers and duties of cities and incorporated towns and providing the mode and manner of making street and alley improvements," etc., do not create an indebtedness within the inhibition of the state constitution declaring that no municipal corporation shall become indebted to an amount in excess of two per cent. of its taxable property. The bonds issued by the city for the purpose of raising money with which to pay for the improvement, or issued to the contractor in payment for the work, bear the name of the street or alley improved or sewer constructed, and are payable out of the special street improvement fund to be accumulated from assessments made against the property benefited, and hence no indebtedness arises against the city.[1]

The fact that a city has already exhausted its constitutional power to incur a debt can not be shown to defeat a proceeding by it to improve a street by special assessment in part, and partly by general taxation. That question can not arise until the city seeks to borrow money or incur an indebtedness in that regard.[2]

A contract made by a city whose indebtedness has already reached the constitutional limit by which a contractor agrees to construct a sewer and to accept in payment of the contract price certificates assessing the benefits against the property benefited, does not create any liability on the part of the municipality, and is not within the constitutional prohibition of the statute of Iowa.[3]

Indeed it is a general rule that obligations payable only from special assessments, of this nature, do not constitute an in-

[1] Quill *v.* City of Indianapolis, 124 Ind. 292; Board *v.* Fullen, 111 Ind. 410; Strieb *v.* Cox, 111 Ind. 299; Board *v.* Hill, 115 Ind. 316; State *v.* Hawes, 112 Ind. 323; Mayor *v.* Gill, 31 Md. 375; Heick *v.* Voight, 110 Ind. 279; Hammett *v.* Philadelphia, 65 Pa. St. 146; Chamberlain *v.* City of Cleveland, 34 Ohio St. 551.

[2] Railway Co. *v.* The City of Jeffersonville, 114 Ill. 562.

[3] Davis *v.* Des Moines, 71 Iowa 500, 32 N. W. R. 470.

debtedness of the municipality within the meaning of the constitutional or statutory prohibition.[1]

§ 65. **Limitation as to free gravel road bonds.**—Bonds issued by a board of county commissioners for the purpose of raising money to pay for the construction of a free gravel road, do not constitute an indebtedness against the county within the inhibition of the state constitution of Indiana.[2]

§ 66. **Limitation upon the power to issue bonds to build school-house.**—A municipal corporation can not, under the constitution of Indiana, issue bonds to obtain funds with which to rebuild a school-house, when the issuance of the bonds will create a debt in excess of two per centum of the taxable value of the property within the corporate limits of the corporation.[3]

§ 67. **Indebtedness created on contracts extending into the future.**—As a general rule it has been held that the prohibition against the creation of indebtedness beyond a certain amount extends to debts incurred to be paid on a future day as well as those payable at once.[4]

Thus, it has been held that a debt payable in the future is obviously no less a debt than if payable presently, and the

[1] In addition to the authorities already cited, see, also, City of Clinton *v.* Walliker, 98 Iowa 655, 68 N. W. R. 431; Baker *v.* Seattle, 2 Wash. 576; Goshen Hy. Comrs. *v.* Jackson, 165 Ill. 17; Kansas City *v.* Ward, 134 Mo. 172; Kelly *v.* Minneapolis, 63 Minn. 125; Little *v.* Portland, 26 Ore. 235; Denny *v.* City of Spokane, 79 Fed. R. 719.

[2] Board *v.* Hill, 115 Ind. 316; Strieb *v.* Cox, 111 Ind. 299; Spidell *v.* Johnson, 128 Ind. 235; Board *v.* Reeves, 148 Ind. 467, 46 N. E. R. 995; Braun *v.* Board, 66 Fed. R. 476, affirmed in 70 Fed. R. 369. But see Kimball *v.* Board, 21 Fed. R. 145; State *v.* Comrs., 37 Ohio St. 526; Fowler *v.* City of Superior, 85 Wis. 411, 54 N. W. R. 800.

[3] Town of Winamac *v.* Huddleson, 132 Ind. 217. See, also, Wetmore *v.* City of Oakland, 99 Cal. 146, 33 Pac. R. 769; Shaw *v.* Independent School Dist., 77 Fed. R. 277; City of Richmond *v.* Powell (Ky.), 27 S. W. R. 1. But compare Todd *v.* City of Laurens, — S. Car. —, 26 S. E. R. 682; Wilson *v.* Board, 133 Ill. 443.

[4] Law *v.* People, 87 Ill. 385; Davenport *v.* Kleinschmidt, 6 Mon. 502, 16 Am. and Eng. Corp. Cases, 301; Wallace *v.* San Jose, 29 Cal. 180, Niles Water-works *v.* Niles, 59 Mich. 311, 11 Am. and Eng. Corp. Cases, 299; Salem Water Co. *v.* Salem, 5 Ore. 29; Spilman *v.* City of Parkersburg, 35 W. Va. 605, 14 S. E. R. 279.

debt payable on a contingency, such as the rendering of some service or the delivery of property, etc., is some kind of a debt, and therefore within the constitutional prohibition. But if a contract or undertaking contemplates any contingency and liability to pay when the contingency occurs the liability is absolute, the debt exists, and differs from a present unqualified promise to pay only in the manner by which the indebtedness was created.[1]

So, too, it has been held that where a contract by which a city agrees to pay a definite amount of money on the completion of certain water-works, creates a debt against the city for the amount to be paid from the time of the execution of such contract. Justice McGruder, delivering the opinion of the court, said: "It can not be said that the indebtedness did not come into being until the work was completed and accepted by the city. The city bound itself to pay for the work before it should be completed, and could be compelled to do so if the work should be done according to the contract."[2]

In West Virginia it was held that where an indebtedness of a city for current expenses in supplying water is forbidden as being in excess of the constitutional limit, the contract upon which it arose, though in itself executory and creating only a contingent liability, is also forbidden. Prohibition of the end is also prohibition of the directly designed appropriate means. This is a true construction; any other would deprive this constitutional limitation of the force and efficiency indispensably required to prevent or cure the evil aimed at.[3]

In Montana an act of 1883 amended the charter of the city of Helena, limiting the power of the city council "to incur indebtedness on behalf of said city for any purpose whatever to exceed the sum of $20,000." It was held that a contract which binds the city to take water for a period of twenty years from the contractor at an annual rental of $15,000, where the bonded indebtedness of the city is $19,500 and the floating

[1] City of Springfield *v.* Edwards, 84 Ill. 627.

[2] Culbertson *v.* Fulton, 127 Ill. 30.

[3] Spillman *v.* City of Parkersburg, 35 W. Va. 605, 14 S. E. R. 279.

indebtedness over $15,000, is in violation of the charter, as such a contract creates indebtedness within the meaning of such amended act.[1]

But the courts in New York and Iowa hold that the obligation under a contract on the part of a municipal corporation to pay for work when it should be performed in the future, does not constitute indebtedness within the meaning of the prohibition until the actual performance of the work.

Thus, in New York, a municipality entered into a contract to grade and pave a street. The contract was dated July 5, 1885, and the work was to be performed within one year; the time of completion being thereby extended beyond the existing political year. It was held that this contract did not violate the provisions of the charter, which prohibited any expenditure within the year beyond the amount authorized to be raised to defray any expenses of the city, including all debts due from it, and that the contract did not create a debt within the meaning of that provision until the service was performed and the contractor was entitled to be paid.[2]

In Iowa the supreme court held that the constitution applies not only to a present indebtedness, but also to such as is payable on a contingency at some future date, or which depends on some contingency before a liability is created. But it must appear that such contingency is sure to take place, irrespective of any action taken or option exercised by the city in the future. That is, if a present indebtedness is incurred, or obligations assumed, which, without further action on the part of the city, has the effect to create an indebtedness at some future date, such are within the inhibition of the constitution. But if the effect of the indebtedness depends upon some act of the city, or upon its volition to be exercised or determined at some future date, then no present indebtedness is incurred, and none will be until the period arrives and the required act or option is exercised, and from that time only can it be said

[1] Davenport *v.* Kleinschmidt, 6 Mont. 502, 13 Pac. R. 249.

[2] Weston *v.* Syracuse, 17 N. Y. 110.

there exists an indebtedness within the meaning of the constitutional provision.[1]

Where a city entered into a contract for lighting its streets for a term of thirty years, the agreed price to be paid therefor to be monthly, which sum for any one year was not in excess of the constitutional limitation, but taken for the whole term was in excess of the debt it was authorized to incur, it was held by the supreme court of Illinois that the contract was not prohibited by the constitutional provision, but was legal and binding, there being created no present indebtedness for the whole sum, but only as the gas should be supplied from month to month.[2]

§ 68 **Indebtedness created for current expenses construed by various state courts.**—In some of the states it has been held that contracts relative to the ordinary expenses of municipalities do not create an indebtedness within the meaning of the constitutional prohibition, and this right to thus apply the current revenues to the defraying of ordinary expenses is founded upon the principle that such a course is necessary to the life of the municipality and to the successful operation of the purposes for which it was created.[3]

In Texas it has been held that issuing warrants for the payment of current expenses of the city which do not exceed the current revenues derived from taxation, is not the creation of a debt prohibited by section 5, article 11, of the state constitution, which provides that no debt shall ever at any time be created by any city unless provision is made for the collection of a tax sufficient for the payment of interest and of a sinking fund of two per cent. Justice Gaines delivering the opinion of the court said: "A debt for current expenses in order to be valid without a compliance with the constitutional and statutory requirements must run concurrently with the current ex-

[1] Burlington Water Co. *v.* Woodward, 49 Iowa 58.

[2] East St. Louis *v.* East St. Louis Gas Light Co., 98 Ill. 415. See, also, Keihl *v.* City of South Bend, 76 Fed. R. 921, 36 L. R. A. 228.

[3] Grant *v.* Davenport, 36 Iowa 396; Corpus Christi *v.* Woessner, 58 Tex. 462; State *v.* McCauley, 15 Cal. 429; People *v.* Pacheco Co., 27 Cal. 207.

penses for such purposes, and such a debt can not be created, without such compliance, which matures at such a time as would make it a charge upon the future revenues of the city.'"[1]

The constitution of Indiana limiting the amount of indebtedness of any political or municipal corporation, does not apply to water to be paid for as water is furnished, provided the contract price can be paid from the current revenues as the water is furnished, without increasing the corporate indebtedness beyond the constitutional limit, or encroaching upon funds set apart to other purposes. The items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like, constitute current expenses, payable out of current revenues. Hence where the current revenues are sufficient to discharge all current expenses without increasing the indebtedness, there is no corporate debt incurred for such expenses.[2]

In Oklahoma the supreme court held that a municipal corporation has the implied power to incur indebtedness whenever it is necessary to do so to carry out any power conferred upon it, unless the contracting of said indebtedness is prohibited by statute.[3]

But, in Illinois, a city or other municipal corporation is absolutely prohibited from becoming indebted in any manner or for any purpose to an amount including existing indebtedness, in the aggregate exceeding five per cent. on the value of taxable property therein, etc. Under this provision it has been held that when such municipality shall have reached the limit prescribed by the constitution it is prohibited from making any contract whereby indebtedness is created, even for the neces-

[1] City of Terrill *v.* Dessaint, 71 Tex. 770, 9 S. E. R. 593; Corpus Christi *v.* Woessner, 58 Tex. 462.

[2] City of Valparaiso *v.* Gardner, 97 Ind. 1; Sackett *v.* City of New Albany, 88 Ind. 473; East St. Louis *v.* East St. Louis, 98 Ill. 415; Prince *v.* City of Quincy, 105 Ill. 138; Dively *v.* City of Cedar Falls, 27 Iowa 227; Grant *v.* City of Davenport, 36 Iowa 396; French *v.* City of Burlington, 42 Iowa 614; Burlington Water Co. *v.* Woodward, 49 Iowa 58; Scott *v.* City of Davenport, 34 Iowa 208; State *v.* McCahuley, 15 Cal. 429, People *v.* Pacheco, 27 Cal. 175; Appeal of the City of Erie, 91 Pa. St. 398; City of Vincennes *v.* The Citizens' Gas Light Co., 132 Ind. 114.

[3] Hoffman *v.* County Comrs. (Okla.), 41 Pac. R. 566, 3 Okla. 325.

sary current expenses in the administration of the affairs and government of the corporation.[1]

The supreme court of appeals of West Virginia has held that a city indebted up to the limit fixed by the constitution can not carry on its operations upon credit within the meaning of credit in the constitution, in any manner or for any purpose, but must pay during the current year with funds in hand, or with funds already legally levied. And a city thus indebted can not increase its indebtedness beyond the constitutional limit by contracting for an electric apparatus and plant, and such indebtedness being forbidden, the contract out of which it arose, although executory, is also forbidden. The end aimed at is prohibited, and this carries with it the prohibition of the means directly and appropriately designed and adapted for its accomplishment.[2]

The constitution of Indiana provides that "no political or municipal corporation shall ever become indebted in any manner or for any purpose, to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void."[3]

In construing this provision of the constitution the supreme court of Indiana has held that a city being indebted to an amount equal to two per centum of its taxable property, is prohibited from issuing an order on its treasury, even for current expenses, where there are no funds in the treasury which may be applied to its payment, and may be enjoined from issuing

[1] Prince *v.* Quincy, 105 Ill. 138, 2 Am. and Eng. Corp. Cases, 66, 44 Am. R. 785; Springfield *v.* Edwards, 84 Ill. 626; Fuller *v.* Chicago, 89 Ill. 282; Law *v.* People, 87 Ill. 385; Prince *v.* Quincy, 128 Ill. 443, 26 Am. and Eng. Corp. Cases, 498; Fuller *v.* Heath, 89 Ill. 296. So it has been held in Illinois that certificates of indebtedness issued to procure temporary loans of money for current expenses are *ultra vires* if at the time they were issued the debt of the municipality had reached the constitutional limit. Law *v.* People, 87 Ill. 385.

[2] Spilman *v.* City of Parkersburg, 35 W. Va. 603, 14 S. E. R. 279.

[3] Article 13, of the State Constitution, adopted March 14, 1881.

such an order when one is about to be issued, and no provision has been made for its payment.[1]

§ 69. **Power to incur indebtedness in anticipation of revenues.**—Notwithstanding the fact that the indebtedness of a municipality has exceeded the limit prescribed by the constitution, revenues may be appropriated in anticipation of the receipt thereof.[2]

Thus an act in Nevada directing that the state treasurer set apart from the first moneys coming into the general fund a specific fund as a legislative fund, and which requires a state treasurer to draw his warrant on said fund in favor of the members and attachees of the legislature, does not create an indebtedness within the meaning of the state prohibition, and it is not necessary to the validity of such statute that funds to meet the appropriation should be in the treasury.[3]

A statute in California which authorizes the commissioners to contract for the erection of a building, and appropriates for that purpose the requisite sum, thus anticipating the expenses of any liability on the part of the state, is within the prohibition against increasing the indebtedness of the state beyond a specified sum.[4]

But a statute which authorizes the collection of a special tax and appropriates and sets apart the moneys derived therefrom for the payment of coupons on bonds issued by railroad companies, does not create a debt within the meaning of the constitutional prohibition of California.[5]

In Georgia, however, a statute authorizing commissioners to contract for the erection of a public building is held invalid if it fails to make provision simultaneously for the payment of the costs.

[1] Sackett *v.* The City of New Albany, 88 Ind. 473.

[2] State *v.* Parkinson, 5 Nev. 15; East St. Louis *v.* Flannigan, 26 Ill. App. 449; State *v.* McCauley, 15 Cal. 429; People *v.* Brooks, 16 Cal. 1; People *v.* Pacheco, 27 Cal. 175; People *v.* May, 9 Colo. 404; City of Springfield *v.* Edwards, 84 Ill. 626; Law *v.* People, 87 Ill. 385; Fuller *v.* Heath, 89 Ill. 296.

[3] State *v.* Parkinson, 5 Nev. 15.

[4] Koppikus *v.* State Commissioners, 16 Cal. 248.

[5] People *v.* Pacheco, 27 Cal. 175.

In Ohio it has been held that a contract binding the state to pay specific sums at certain dates without revenues provided or appropriations to meet such sums, is within the constitutional provision.[1]

The only manner in which revenues already levied and to be collected can be anticipated by a municipality without becoming indebted, is said to be by the drawing of a warrant after the tax has been levied, which will have the legal effect and operate as a contract between the corporation and the person receiving it, that the municipality shall thereby incur no liability. The effect of the warrant must be to impose the duty upon the proper officers to collect and pay over the tax in accordance with the appropriation, and the remedy for any failure in that regard must be against the officers and not against the corporation.[2]

The warrant drawn against the tax levied must operate as an assignment without imposing any liability upon the corporation.[3]

Thus, in Colorado, it has been held that a warrant upon a county treasurer, issued after the constitutional limit has been reached, which is general in form, and does not purport to be payable to any particular fund or out of the revenues of the tax for any specified year, is simply an evidence of indebtedness within the meaning of the constitutional prohibition.[4]

In Illinois a warrant, directed and addressed to the city treasurer, directing him to pay to the creditor or bearer a certain sum and charge to the appropriation for a certain department, is an evidence of city indebtedness and not an anticipation of the tax levied for that year. To operate as an anticipation the warrant should be specifically drawn against the uncollected tax of the particular year and fund to which the money was advanced, and not against the general fund or other funds in the treasury.[5]

[1] State *v.* Medberry, 7 Ohio St. 522.

[2] City of Springfield *v.* Edwards, 84 Ill. 626; Law *v.* People, 87 Ill. 385.

[3] Law *v.* People, 87 Ill. 385; People *v.* May, 9 Colo. 404.

[4] People *v.* May, 9 Colo. 404.

[5] Fuller *v.* City of Chicago, 89 Ill. 282.

So, too, it has been held in Illinois that a certificate on which it appears that a person has advanced to the city a certain sum to meet the current expenses of the year for which an appropriation has been made, and that such sum will be paid to the lender at the office of the city treasurer with interest out of the tax levied for said fiscal year, said tax levy having been heretofore actually made, and ordering the city treasurer to make payment and charge the general appropriation fund, is an evidence of corporate indebtedness, and constitutes an obligation to the city within the meaning of the constitutional limitation, its payment not being limited solely to taxes levied for the particular fund.[1]

And where warrants, which on the face appropriate taxes levied to their payment, are issued after the limit of indebtedness has been reached, they are to be construed in the same manner as if it were written out on the face that no city can make a valid contract by which it can become indebted beyond the constitutional limit, and that even for meeting its necessary current expenses no city can anticipate the collection of taxes for such purposes unless the taxes for that purpose be actually levied, and then only by exchange of a warrant drawn upon the proper fund, to be paid out of the tax when collected, for the thing for which the warrant is given, and that by making this exchange the city can not lawfully incur any liability, but the owner of the warrant must rely solely upon the ability and fidelity of the revenue officers in the collection and payment of the money mentioned in the warrant.[2] To illustrate, a warrant was drawn in the following terms in anticipation of the collection of taxes, namely "from the tax of the year 1887 appropriated and levied for the police department when received by you pay A. B. or bearer, the sum of ———, being for services rendered and payable out of the appropriation for said department, and charge the same to the police department. The taxes to be collected for account of this fund, are specifically appropriated, set apart and pledged for the amount of this and all warrants drawn thereon, which war-

[1] Fuller *v.* City of Chicago, 89 Ill. 282.

[2] Fuller *v.* Heath, 89 Ill. 296.

rants do not exceed eighty-five per cent. of the appropriation made therefor." The supreme court of Illinois held that such a warrant imposed no liability upon the city, and was not, therefore, an evidence of indebtedness within the constitutional provision.[1]

And it has been held by the supreme court of Nevada that the addition of an interest clause to such a warrant does not have the effect of bringing it within the meaning of the constitutional provision.[2]

But, while the courts have held that revenues which are absolutely certain to be received by the collection of a tax may to some extent be anticipated, the rules should not be so far relaxed as to impair the force of a constitutional provision, or nullify its spirit. Thus it has been held in Iowa, that when it takes revenues of two years to pay the indebtedness incurred in one, or previously, the constitutional limitation should be applied to the contracting of any further indebtedness. "If the ordinary revenues are not sufficient for the payment of the current expenses, improvement of the streets must be postponed for a time. * * * The diversion of the money was an appropriation of the money without the authority of law, and where the tax-payers complain of such diversion the court is unwilling to sanction any such proceeding. No such subterfuge can be permitted to prevail for the purpose of upholding an otherwise unconstitutional indebtedness."[3]

§ 70. **Salary of public officer when an indebtedness within the meaning of the constitution.**—The payment of the salary of a public officer whose office has been created and salary fixed by law, either statutory or constitutional, is not within the provision of section 18, of article 11 of the constitution of California.

The supreme court of that state, in construing this provision of the constitution, held that it is quite apparent that this clause of the constitution refers only to indebtedness or liability which one of the municipal bodies mentioned has it-

[1] Fuller *v.* Heath, 89 Ill. 296.
[2] State *v.* Parkinson, 5 Nev. 15.
[3] French *v.* City of Burlington, 42 Iowa 614.

self incurred; that is an indebtedness which the municipality has contracted or a liability resulting in whole or in part from some act or contract of such municipality. Such is the plain meaning of the language used. The clear intent expressed in such clause was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur or not to incur. But the stated salary of a public official, fixed by statute, is a matter over which the municipality has no control, and with respect to which it has no discretion, and the payment of his salary is a liability established by the legislature at the date of the creation of the office. It, therefore, is not an indebtedness, or liability incurred by the municipality within the meaning of such clause of the constitution.[1]

But it is held in Illinois that the salary of a health officer is an indebtedness within the meaning of the constitution of Illinois fixing the limit of the indebtedness which may be incurred by a city.[2]

§ 71. **Compulsory or imposed obligations.**—There is no difference between indebtedness created by contracts of a municipality and that form of debt denominated "compulsory or imposed obligations," and those created by operation of law. This is especially true where the limitation is imposed by a constitutional provision. The compulsory debt is imposed by the legislature of the state; and the legislature can no more impose it than the municipality can voluntarily assume it as against the disability of a constitutional prohibition.

The supreme court of the United States, in passing upon this question, has held that the legislature can not impose upon a county a compulsion to incur debt, nor can a county clerk assume it as against the disability of a constitutional prohibition. Mr. Justice Lamar said: "Neither can we assent to the position of the court below that there is, as in this case, a differ-

[1] Lewis *v.* Widber, 99 Cal. 412, 33 Pac. R. 1128. It is not such a debt as requires any provision for payment other than is made for the liquidation of current expenses. City of San Antonio *v.* Micklejohn, 33 S. W. R. 737.

[2] Norton *v.* City of East St. Louis, 36 Ill. App. 171; Lake Co. *v.* Rollins, 130 U. S. 662.

ence between an indebtedness incurred by contracts of the county and that form of debt denominated 'compulsory obligations.' The compulsion was imposed by the legislature of the state, even if it can be said correctly that the compulsion was to incur debt; and the legislature could no more impose it than the county could voluntarily assume it as against the disability of a constitutional prohibition. Nor does the fact that the constitution provided for certain county officers, and authorized the legislature to fix their compensation, and that of other officials, affect the question.''[1]

§ 72. **Prohibitory indebtedness construed.** — The supreme court of Iowa has held that there is no distinction in reason between the cases of entire absence of enactment conferring power and the prohibition of its exercise beyond a certain limit.[2]

The prohibition to create an indebtedness is usually construed to apply to indebtedness of all forms incurred in any manner or for any purpose, and is not merely applicable to bonded indebtedness.[3]

Thus, in Montana, where a city charter contained a provision that "said city shall not be authorized to incur any indebtedness for any purpose whatever" in excess of a specified sum, it was held to apply to both bonded and floating indebtedness.[4]

In Colorado, a county warrant issued in excess of the constitutional limit of municipal indebtedness has been held to be void, and its holder can not compel the county issuing it to apply it in payment of taxes.[5] In considering the question, Mr. Justice Elbert, in delivering the opinion of the court, said: "It is worthy of note, in this connection, that in many, if not all, of the states named, a constitutional provision limiting the

[1] Board of Lake Co. *v.* Rollins, 130 U. S. 662. See, also, Lewis *v.* Widbur, 99 Cal. 412; Barnard *v.* Knox County, 105 Mo. 382; Prince *v.* Quincy, 128 Ill. 443; City of Council Bluffs *v.* Stewart, 51 Iowa 385.

[2] McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215.

[3] People *v.* May, 9 Colo. 80, 10 Pac. R. 641; Law *v.* People, 87 Ill. 385; French *v.* City of Burlington, 42 Iowa 614; City of Council Bluffs *v.* Stewart, 51 Iowa 385; Lake Co. *v.* Rollins, 130 U. S. 662.

[4] Davenport *v.* Kleinschmidt, 6 Mont. 502, 13 Pac. R. 249.

[5] People *v.* May, 9 Colo. 80, 10 Pac. R. 641.

aggregate amount of county indebtednes has been questioned upon like ground, that it was intended to apply only on the bonded indebtedness, and that the decisions have uniformly been adverse to the construction claimed."[1]

In Illinois it has been held that certificates issued by a city on which to procure "temporary loans," stating that the city owes the holder the specified sum of money, and directing the treasurer to pay at a specified time or otherwise, are evidences of indebtedness owing by the city within the meaning of the constitutional prohibition. And it is not essential to the existence of a debt that it shall be due at the time it is created.[2]

§ 73. **When municipal corporation is not liable in tort for failure to pay indebtedness contracted in violation of constitutional limitation.**—A municipal corporation can not be held liable in tort for the simple refusal of its council to pay an indebtedness contracted in contravention of the constitution of the state limiting the amount of the municipal indebtedness that it may create, and made to pay as damages the precise amount of that indebtedness, with interest from the time it became due. The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution to carry on their corporate operations, while so indebted upon the cash system, and not upon credit, to any extent or for any purpose. Hence, if an indebtedness of a municipality for current expenses and supplying water is forbidden, as being in excess of the constitutional limit, the contract upon which it arose, though in itself executory and creating only a contingent liability, is also forbidden. Prohibition of the end is prohibition of the direct, designed and appropriate means.[3]

[1] City of Council Bluffs *v.* Stewart, 31 Iowa 385, 1 N. W. R. 628; Law *v.* People, 87 Ill. 385; Prince *v.* City of Quincy, 105 Ill. 138; Appeal of City of Erie, 91 Pa. St. 398; Wisconsin, etc., Co. *v.* Taylor Co., 52 Wis. 37, 8 N. W. Rep. 833.

[2] Law *v.* People, 87 Ill. 385.

[3] Prince *v.* City of Quincy, 128 Ill. 443; Prince *v.* City of Quincy, 105 Ill. 138, 215; East St. Louis *v.* East St. Louis Gas Light Co., 98 Ill. 415; City of Cairo *v.* Campbell, 116 Ill. 305; City of Springfield *v.* Edwards, 84 Ill. 626; Law *v.* People, 87 Ill. 385; Fuller *v.* City of Chicago, 89 Ill. 282; Fuller *v.* Heath, 89 Ill. 296; Howell *v.* City of Peoria, 90 Ill. 104; City of Litchfield *v.* Ballou, 114 U. S. 190.

§ 74. **When limitation of indebtedness no defense in actions arising on torts.**—In an action to recover for an injury in consequence of a defective sidewalk, an answer alleging that the city was indebted up to the constitutional limit and had no funds with which to repair its streets and sidewalks is not a valid defense under the constitution and statutes of Indiana.[1]

A municipal corporation is responsible for the want of fidelity or negligence of those who are authorized to act for it, and such liability is not within the constitutional and statutory limitations in regard to the creation of indebtedness.[2]

A municipality can not escape a liability for an obligation arising on a tort by setting up as a defense that its indebtedness has already reached the constitutional limit. Thus, in California where, by the charter of the city of San Francisco, it was provided that, "The common council shall not create or permit to accrue any debts or liabilities which, in the aggregate with all former debts or liabilities, shall exceed the sum of fifty thousand dollars over and above the annual revenue of the city, unless the same shall be authorized by ordinance for some specific object," it was held that the provision referred only to acts or contracts of the city, and not to liabilities which the law may cast upon it; that, notwithstanding the provision, the city was liable for money paid to it without any consideration or by mistake, and for damages for personal injuries caused by the neglect of the city to keep its streets in repair.[3]

The constitution of Iowa has been construed by the supreme court of that state to fix an absolute limit to the amount of indebtedness which a municipality has the power to create. The court held that the constitutional inhibition is not applicable to liabilities arising in tort, and it is, therefore, no defense in an action against a municipality that damages caused by defective streets or sidewalks when a municipality was indebted

[1] City of New Albany *v.* McCulloch, 127 Ind. 500. See, also, Elliott on Roads and Streets, 446.

[2] City of Chicago *v.* Sexton, 115 Ill. 230.

[3] McCracken *v.* San Francisco, 16 Cal. 591.

at the time of the accident up to or beyond the constitutional limit.[1]

In an action on the case against the city to recover for a personal injury growing out of negligence on the part of the city it can not raise the question that it is already indebted to an amount in excess of the constitutional limitation.[2]

§ 75. **Validity of contracts for attorney's fees when indebtedness is in excess of the constitutional limit.**—Notwithstanding the debt of a municipality may be actually or nominally up to the constitutional limit which declares that no political or municipal corporation shall ever become indebted in any manner or for any purpose to an amount in the aggregate exceeding two per cent. of the value of the taxable property within such corporation, it will not operate to invalidate a contract made by its common council agreeing to pay an attorney for services to be rendered in compromising or contesting any part of such indebtedness. Thus, a city was largely indebted in excess of the constitutional limit, and entered into a contract with an attorney by the terms of which he undertook and agreed to effect a compromise and settle with the holders of the bonds and coupons, and procure the indebtedness to be canceled and surrendered to the city upon such terms as might be agreed upon by the common council of the city and the holders, for which services the city promised and agreed to pay him five per cent. of the amount of the reduction which he might secure from the principal and interest of the bonds and coupons. It was further provided that in case said attorney should fail to secure a compromise and reduction satisfactory to the common council of the city, he was to receive no compensation for his services except the sum of one hundred dollars, which was to be paid toward his expenses. It further appeared that he entered upon the performance of his contract, that the city paid him one hundred dollars out of its treasury

[1] Bartle *v.* Des Moines, 38 Iowa 414; Rice *v.* Des Moines, 40 Iowa 638; French *v.* Burlington, 42 Iowa 614; People *v.* May, 9 Colo. 404, 13 Am. and Eng. Corp. Cases, 307.

[2] City of Bloomington *v.* Perdue, 99 Ill. 329; City of Chicago *v.* Sexton, 115 Ill. 230.

for his expenses, and that he secured a compromise which was acceptable to the city, the result of the settlement being that the bonds and interest coupons were surrendered up and canceled, thereby saving the city the sum of $46,000, the entire indebtedness of the city having been $141,000. In an action by the attorney against the city to recover the amount which the city agreed to pay for his services in effecting a compromise and settlement of said bonded indebtedness against the city, the defense relied upon by the city was that the contract to pay five per cent. was within the constitutional inhibition, because the city was already indebted in an amount beyond the limit of the constitution. The supreme court of Indiana held that the contract with the city did not contemplate the creation of a new or additional debt. It was a contract for services to be rendered in securing the reduction of an existing debt. It never was intended that a municipality whose indebtedness was actually or nominally up to the constitutional limit might not contract for the services of an agent or attorney to contest the validity of the whole or any part of its indebtedness, and secure a reduction of the amount thereof. To give the constitution such a construction would effectually be to tie the hands of municipalities, so to speak, and disable them from entering into any arrangement for refunding or reducing the amount of their pre-existing indebtedness by new promises to pay, or by any arrangement looking to a compromise.[1]

In a case in Louisiana involving this identical question, it was held that as a general rule a parish can not, through its police jury or otherwise, contract a debt or incur an obligation binding upon it without at the same time providing the means of paying such debt; but if the parish is involved in heavy litigation, the police jury have the right to contract with experienced attorneys, in addition to their regularly paid attorney, to aid in the defense of such suit, and the parish is legally bound for the payment of their fees.[2]

The court in the course of the opinion in this case said:

[1] City of Logansport *v.* Dykeman, 116 Ind. 15.

[2] Talbott *v.* The Parish of Iberville, 24 La. Ann. 135.

"The only grounds urged in opposition to this claim that we deem it necessary to consider are, that police juries are corporate bodies of special and limited powers, which are to be strictly construed, and that they are by statute prohibited from contracting debts without 'fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so contracted.' Revised Statutes, section 2786. The only question, therefore, to consider is whether in providing for expenses of the parish the police jury was authorized to provide for the payment of the attorneys' fees in question as a part of the necessary current expenses of the parish, and to determine this question we must advert to the facts and circumstances existing at the time. Suits for various sums amounting in the aggregate to over forty thousand dollars, were instituted against the parish, which the police jury judges it important to the parish to defeat. To this end it was deemed prudent to employ able and experienced counsel to aid the parish attorney in the defense of these suits. The parish as a political corporation, acting through the members of the police jury as their agents, was clearly competent to use the ordinary legal means of defense when assailed by parties seeking to enforce against the parish heavy debts and liabilities. There was nothing to prohibit the corporation from employing other attorneys in aid of its own in defense of lawsuits which might seriously affect the interests of the people of the parish. The discretion to do so, we think, can hardly be questioned. The compensation of counsel so employed may fairly be considered a contingent expense, and properly ranked among other current expenses which the police jury is authorized to provide for."

§ 76. **Constitutional limitations no defense to action for recovery of illegal tax.**—Where a tax is illegal and void, and the owner of the property upon which the tax is levied makes payment under protest and under such circumstances that it is not a voluntary payment, he may recover it back, although at the time he paid the tax to the city from which he seeks to recover it back the city was indebted beyond the constitutional

limit. Section 3, article 11, of the constitution of Iowa, providing that no county or other municipal corporation shall be allowed to become indebted to an amount exceeding five per cent. of the value of the taxable property within such county or corporation, applies only to such indebtedness as is created by the voluntary action of both the debtor and creditor.[1]

§ 77. **Constitutional limitation in case of several municipal corporations within same territory.**—The constitutional limitation upon the extent of corporate indebtedness has been held in Illinois to apply to each municipal corporation singly. Where one such corporation may partially embrace the same territory as others, it may contract corporate indebtedness without regard to the indebtedness of any other corporate body embraced wholly or in part in its territory.[2]

§ 78. **As to the effect of constitutional limitation by annexation of two or more cities into one.**—The prohibition of section 11, article 9, of the constitution of Illinois, limiting municipal indebtedness, does not prohibit the annexation of two or more cities, incorporated towns or villages to each other, in the manner provided by the act of 1889.

The constitution contains no restriction as to the organization of cities, towns and villages, or the changing and amending or repeal of their charters, and consequently no restriction in respect to uniting or dividing cities, towns and villages, save only that it can not be by local or special law, but must be by general law. In the absence of constitutional restriction, the legislature may provide for the organizing, uniting, dividing or annulling of such corporations, in such manner as it shall deem best to promote the public welfare. Hence, by the annexation of two or more cities into one, the indebtedness of neither of the municipalities is increased. The body resulting from such annexation will have the same property and

[1] Thomas *v.* City of Burlington, 69 Iowa 140, 28 N. W. R. 480.

[2] Wilson *v.* Board of Trustees, 133 Ill. 443. See, also, State *v.* Lancaster Co. Comrs., 6 Neb. 214; Adams *v.* East River, etc., Inst., 136 N. Y. 52. But see *ante*, § 65.

owe the same debts which were owned and owed by the several bodies before the annexation. There will be no increase of the corporate indebtedness.[1]

[1] True *v.* Davis, 133 Ill. 522; Morgan *v.* Beloit, 7 Wall. 613; Thompson *v.* Abbott, 61 Mo. 176; Mount Pleasant *v.* Beckwith, 100 U. S. 514. A city to which territory is annexed, which was formerly part of another municipality, may be made liable by the legislature for a portion of the debt of the municipality from which the territory was detached. Grant County *v.* Lake County, 17 Ore. 453. See, generally, Rumsey *v.* Town of Sauk Centre, 59 Minn. 316, 61 N. W. R. 330; Riley *v.* Township of Garfield, 54 Kan. 463, 38 Pac. R. 560; Potter *v.* Black (Wash.), 45 Pac. R. 787; Pacific Imp. Co. *v.* City of Clarksdale, 74 Fed. R. 528.

CHAPTER IV.

STATUTORY LIMITATIONS OF INDEBTEDNESS.

§ 79. Federal limitations of indebtedness in territories.
80. Federal limitations of indebtedness in territories construed.
81. Federal limitation upon the power of the legislature to impose liability on a municipality.
82. Statutory limitations upon the power to incur indebtedness for water supply and lighting.
83. Special charter limitations of indebtedness construed.
84. Statutory limitations upon the power to issue bonds after the organization of new counties.
§ 85. Statutory limitations upon the power to incur indebtedness for the current year.
86. Purchaser of municipal securities must take notice of what records.
87. When a statute restricting the payment of bonds is void for impairing the obligation of contracts.
88. Limitation upon the power to incur municipal indebtedness does not extend prerequisite powers.

§ 79. **Federal limitation of indebtedness in territories.**—An act of congress in relation to the limitation of municipal indebtedness in territories was passed on July 30, 1886. The fourth section of that act ordains as follows: "No political or municipal corporation, county or subdivision in any of the territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per cent. on the value of taxable property within such corporation, county or subdivision, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void; that nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereun-

der, nor to preclude the issuance of bonds already contracted for in pursuance of express provisions of law; nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation, or subdivision of any territory as to the bonds heretofore issued or contracted to be issued."[1]

§ 80. **Federal limitations of indebtedness in territories construed.**—The act of congress limiting municipal indebtedness in territories sustains the same relation to a territory that a constitutional limitation does to a state. In the preceding chapter we have shown that the supreme court of the United States has, in numerous well-considered cases, construed the provisions of state constitutions which are nearly identical with the act of congress, and in those cases has held that the inhibition applies to every species of indebtedness, whether contracted by municipal authorities or imposed by statutory enactment, or incurred for the necessary running expenses of the municipality. The same rule of construction should be applied to cases arising under the federal statute.

The supreme court of Oklahoma, in a well-considered case, held that the act of congress imposes a limitation upon the power of municipal corporations in territories to become indebted in any manner or for any purpose in excess of four per cent. of the taxable property within such corporation or taxing district, as shown by the last assessment for territorial and county purposes, made previous to the incurring of such indebtedness, and that said limitation applies to "imposed obligations" and statutory liabilities as well as those incurred by the action of the corporate authorities.[2]

In a later case, however, the supreme court of Oklahoma qualified the general doctrine laid down in the case just cited, and held that the act of congress has been modified as to the power of municipalities to incur indebtedness prior to the "first assessment" for territorial and county taxes by various acts of congress, so that municipalities in the territory of Oklahoma may contract a debt not exceeding four per cent. of the taxable

[1] 24 U. S. Stat. 171.

[2] City of Guthrie *v.* New Vienna Bank, 4 Okla. 194, 38 Pac. R. 4; Martin *v.* Territory (Okla.), 48 Pac. R. 106.

property therein, to be ascertained by the first assessment. Hence, an indebtedness created by a county within the provisions of law not in excess of four per cent. of the value of the taxable property therein for county and territorial taxes, and prior to the first assessment, is a valid and binding obligation against said county.[1]

The supreme court of Wyoming in construing this federal statute has held that a warrant issued by a school district for a heating apparatus in excess of four per cent. of the taxable property within such corporation was absolutely void, notwithstanding the indebtedness was necessary to the maintenance of the district school.[2]

§ 81. **Federal limitation upon the power of the legislature to impose liability on a municipality.**—The legislature has no power to compel a municipal corporation to pay debts and liabilities which are in excess of the maximum limit fixed by the laws of the United States. Hence, an act of the legislature which attempted to impose the debts of certain provisional governments upon a municipal corporation in the territory of Oklahoma was declared to be void for conflict with the provisions of the act of congress which prohibits municipal corporations in territories from becoming indebted in excess of four per centum on the assessed valuation of the taxable property therein for territorial and county taxes.[3]

But, unless prohibited by the constitution, a mere state statutory limitation may be changed by the legislature by providing for additional indebtedness for a specified purpose.[4]

[1] Hoffman *v.* County Comrs., 3 Okla. 325, 41 Pac. R. 566; Sauer *v.* McMurtry, 4 Okla. 447, 46 Pac. R. 576.

[2] School Dist. No. 3, in Carbon Co., *v.* Western Tube Co., 5 Wyo. 185, 38 Pac. R. 922; Fenton *v.* Blair, 11 Utah 78, 39 Pac. R. 485.

[3] City of Guthrie *v.* New Vienna Bank, 38 Pac. R. 4, 4 Okla. 194. In this case the supreme court of Oklahoma overruled so much of the City of Guthrie *v.* Territory, *ex rel.* Losey, 1 Okla. 188, 31 Pac. R. 190, as declared that the federal statute was not a limitation upon the power of the legislature to impose a liability on a municipality.

[4] Prince *v.* Crocker, 166 Mass. 347, 44 N. E. R. 446.

§ 82. **Statutory limitations upon the power to incur indebtedness for water supply and lighting.**—Where a municipal corporation contracts for water or light, for a specified number of years, at a certain price per annum, the contract does not create a debt for the aggregate sum of all the annual payments, within the meaning of the statutory or constitutional limitation of municipal indebtedness, because the payment for each year does not become obligatory until the services for that year have been rendered. There is some conflict upon this subject, but the rule stated is sustained by the weight of authority as well as reason.[1]

Under a Massachusetts statute, which provides that a municipal corporation shall not incur an indebtedness except in the manner prescribed by the act, it was held that a corporation was not restricted in its power to contract for its supply of water, the consideration therefor to be paid monthly. The court declared that it was, in effect, a cash transaction where the payment was made *pari passu* with the incurring of liability.[2]

It was held by the supreme court of Montana Territory that a contract by which a municipal corporation in that territory whose assessed valuation was five million dollars agreed to pay fifteen thousand dollars a year for a period of twenty years, to supply the corporation with water, was not in conflict with the provision of the federal statute, which prohibits municipal corporations in the territories of the United States from becoming indebted in any manner or for any purpose to an amount exceeding four per centum of the taxable property within such corporation.[3]

A contract entered into by a municipal corporation, whereby such municipality contracts to pay a specified sum per annum, for a term of years, as rental for water hydrants, does not

[1] Crowder *v.* Town of Sullivan, 128 Ind. 486, 28 N. E. R. 94; Foland *v.* Town of Frankton, 142 Ind. 546, 41 N. E. R. 1031; City of New Albany *v.* McCullock, 127 Ind. 500; City of Valparaiso *v.* Gardner, 97 Ind. 1; East St. Louis City *v.* East St. Louis, etc., Co., 98 Ill. 415; Appeal of City of Erie, 91 Pa. St. 398; Grant *v.* City of Davenport, 36 Iowa 396.

[2] Smith *v.* Dedham, 144 Mass. 177.

[3] Davenport *v.* Kleinschmidt, 8 Mont. 467, 13 Pac. R. 249.

create a present indebtedness against the municipality in a sum equal to the aggregate amount of the rental for the entire period of time for which the contract is to run, and hence, is not void as being in conflict with the provision of the federal statute limiting the amount of an indebtedness which may be incurred by such corporation.[1]

Where a city, whose limit of indebtedness was fixed at fifty thousand dollars, contracted with a water company for a supply of water for municipal purposes in consideration of an annual payment of one thousand five hundred dollars for a period of twenty-five years, it was held that as the city was only obliged to make an annual payment when it was earned, the aggregate of such payment could not be considered as the debt of the city, which, added to other debts, would exceed the limit allowed, and render the contract void.[2]

§ 83. **Special charter limitations of indebtedness construed.** —Where the common council of a city was forbidden by the charter to contract debts, incur liabilities, or make expenditures for any one year which should exceed the revenue for any one year, unless authorized so to do by a majority vote of the tax-payers of the city, it was held by the supreme court of Michigan that a contract entered into by the common council without submission to the tax-payers for a supply of water for a specified term of years, at a cost per year which would not exceed the authorized levy of taxes, but the aggregate of which would exceed any such percentage as could be collected in any one year, created a liability against the city for the entire period covered by the contract, and, this aggregate liability being in excess of the revenue which could be legally raised, the contract was absolutely void.[3]

The supreme court of Oregon has held that an agreement by

[1] Territory *v.* City of Oklahoma, 2 Okla. 158, 37 Pac. R. 1094.

[2] Walla Walla Water Co. *v.* City of Walla Walla, 60 Fed. R. 957.

[3] Niles Water-Works *v.* Mayor of Niles, 59 Mich. 311, 26 N. W. R. 525. See, also, Davenport *v.* Kleinschmidt, 6 Mont. 502; Burlington Water Co. *v.* Woodward, 49 Iowa 58; Grant *v.* City of Davenport, 36 Iowa 396; Sackett *v.* City of New Albany, 88 Ind. 473; Prince *v.* City of Quincy, 105 Ill. 138; State *v.* Mayor, 23 La. Ann. 358.

a city to pay a water company one thousand eight hundred dollars per annum for a period of seventeen years in quarterly payments, for water to be furnished the city without any provision for raising and appropriating revenues to be applied in payment for such liabilities as they become due, necessarily created a liability within the meaning of the act of incorporation of the city which prohibited the city from creating, "any debt or liability in any manner," against the city which should exceed the sum of one thousand dollars, and, therefore, the contract was declared to be void.[1]

Where, however, the provision in the charter of a municipal corporation provided that the common council "shall not borrow for general purposes more than fifty thousand dollars," it was held by the supreme court of the United States that it did not limit the debt of the municipality nor prohibit the common council from entering into a contract involving an expenditure exceeding that amount for certain special improvements, such as the grading and improving of streets and the construction of sidewalks, which were expressly authorized by its charter.[2]

§ 84. **Statutory limitations on the power to issue bonds after the organization of new counties.**—Where a statute concerning the organization of new counties contained a proviso that "no bonds of any kind shall be issued by any county within one year after the organization" thereof, and where the act was afterwards amended and the proviso was changed to read that "no bonds shall be voted for and issued within one

[1] Salem Water Co. *v.* City of Salem, 5 Ore. 29; State *v.* McCauley, 15 Cal. 429; People *v.* Brooks, 16 Cal. 11; Koppikus *v.* Comrs., 16 Cal. 249; People *v.* Pacheco, 27 Cal. 175; Conlson *v.* City of Portland, 1 Deady 481; State *v.* Medberry, 7 Ohio St. 522. But, where a city charter provided that money should be raised from year to year to defray the expenses of supplying the city with gas, it was held that the municipal authorities could make a contract to continue for a longer term than a year, for any other construction would bar the city from entering into any contract on any subject whose performance would endure beyond a year. Atlantic City Water-Works Co. *v.* Atlantic City, 48 N. J. L. 378, 15 Am. and Eng. Corp. Cases, 327.

[2] Hitchcock *v.* Galveston, 96 U. S. 341; United States *v.* Fort Scott, 99 U. S. 152.

year after the organization," it was held by the United States circuit court of appeals that the words "voted for" were a further restriction, and not an enlargement of the power of the counties, and that funding bonds were within the prohibition of the act.[1]

Where a statute declaring that after certain steps had been taken a new county "shall be deemed duly organized, provided that no bonds shall be issued within one year after the organization," a county, after taking such steps, is not duly organized for the purpose of issuing bonds, and is not estopped by any recitals in its bonds to show that they were issued within the forbidden time, and are, therefore, invalid in the hands of *bona fide* holders.[2]

In Nebraska it is held that the act relating to cities of the second class which provides "that the bonded indebtedness shall not, at any one time, exceed twenty per cent. of the value of the real estate of such city, according to the assessment of the preceding year," is an independent provision which relates to the entire bonded debt of the city, and, therefore, all bonds issued in excess of the amount so limited are without any authority of law and void.[3]

§ 85. **Statutory limitation on the power to incur indebtedness for the current year.**—A county board can not lawfully incur an indebtedness under the law of Nebraska, against the county in excess of the taxes levied for the current year, nor can they issue warrants in any one year exceeding in the aggregate 85 per cent. of the levy unless there is money in the treasury for the payment of the same.[4]

Under the provision of the California statute that no county shall incur any liability or indebtedness in any manner or for any purpose exceeding in any year its annual revenues, except by the authority of two-thirds vote of the electors, each year's income and revenue is intended to pay each year's indebted-

[1] Coffin *v.* Board of Comrs., 57 Fed. R. 137; Rathbone *v.* Board, 73 Fed. R. 395.

[2] Coffin *v.* Board of Comrs., 57 Fed. R. 137; State *v.* Haskell Co., 40 Kan. 65, 19 Pac. R. 362.

[3] Wheeler *v.* City of Plattsmouth, 7 Neb. 270; Turner *v.* Althaus, 6 Neb. 54; Township of East Oakland *v.* Skinner, 94 U. S. 255.

[4] Wessel *v.* Weir, 33 Neb. 35.

ness, and no liability incurred in any one year shall be paid out of the income or revenues of any future years. The income of each year must be used to pay the debts of that year, and no warrants can be issued after the constitutional limit has been reached.[1] But, the statute of California, which declares that the board of supervisors must not contract debts and liabilities which, added to the salaries of officials, will exceed the revenue of the county for the year, does not mean by "revenue" the actual amount of money received into the county treasury, but the estimate of the board of supervisors of whatt he revenue will be.[2]

In order to defeat an action on county warrants, by invoking a statutory provision which declares that, "no county shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters, etc.," it is not sufficient to show merely that during the years in which the warrants sued on were issued the expenditures exceeded the county revenues for those years, but it must be shown that the limit had been reached before the indebtedness was incurred for which the warrants were issued.[3]

Under a charter prohibiting the common council of a city from "authorizing any expenditure for any purpose," in the current political year, exceeding the amount of the annual tax levy, the council can not authorize any expenditure to be made during the year exceeding the limit; but they are not forbidden to authorize in that year an expenditure to be made in a subsequent year for services to be performed in such subsequent year.[4]

Where the power of the commissioners of public works to incur liability for materials used in the construction of sewers was limited to one hundred thousand dollars, it was held that

[1] Shaw *v.* Statler, 74 Cal. 258, 15 Pac. R. 833; Schwartz *v.* Wilson, 75 Cal. 502, 17 Pac. R. 449; San Francisco Gas Co. *v.* Brickwedel, 62 Cal. 641; Smith *v.* Broderick, 107 Cal. 644.

[2] Babcock *v.* Goodrich, 47 Cal. 488.

[3] Geo. D. Barnard & Co. *v.* Knox Co., 37 Fed. R. 563; Potter *v.* Douglass Co., 87 Mo. 239; Rollins *v.* Lake Co., 34 Fed. R. 845; Western, etc., Co. *v.* Lane, 7 S. Dak. 599, 65 N. W. R. 17.

[4] Weston *v.* Syracuse, 17 N. Y. 110; Ketchum *v.* Buffalo, 14 N. Y. 356; City of Galena *v.* Corinth, 48 Ill. 423; Burr *v.* Carbondale, 76 Ill. 455; Smith *v.* Morris, 2 Cal. 524.

a contract for sewer materials exceeding that amount was not binding upon the city, at least for the excess, but a contractor who had in good faith furnished the materials, which had been received by the city, could recover therefor where the legislature had subsequently legalized the contract.[1]

The charter of Chicago contains the provision that "no contract shall be made by the common council and no expenses incurred unless an appropriation shall have been previously made concerning such expense," and the comptroller is required to submit each year an estimate of an amount necessary to defray the expenses of the city for the current year. With this provision in force the city made a contract with a gas company, whose works were already complete, to take gas for its streets and public buildings at a specified price for the period of ten years. This contract was held invalid on the ground that under the above charter provision there was no actual or reasonable necessity to make a contract extending over ten years, no appropriation having been made commensurate with the obligations of the contract; and, aside from the special provision of the charter, the court inclined to the same rule on the ground that the power was legislative, and that the council could not, without any reasonable necessity appearing, bind their successors for ten years or indefinitely. Justice Drummond, in delivering the opinion of the court, said: "In all cases of contracts to run for years the authority to make them should be clear. It is better that all parties should understand there is a limit to the power of municipal bodies in such cases."[2]

Money derived by a municipality from the sale of bonds is not to be considered as part of its income and revenue within the meaning of a provision that the municipality shall not become indebted in any one year to a greater extent than its income and revenue for such year.[3]

[1] Nelson *v.* Mayor, etc., of N. Y., 63 N. Y. 535; People *v.* Denison, 80 N. Y. 656; McDonald *v.* Mayor, 68 N. Y. 23, 23 Am. R. 144; Smith *v.* City of Newburgh, 77 N. Y. 130.

[2] Garrison *v.* Chicago, 7 Biss. 480.

[3] Webb City, etc., Co. *v.* City of Carterville, 142 Mo. 101, 43 S.W.R. 625. But income derived from licenses and other sources, as well as from taxa-

§ 86. **Purchaser of municipal securities must take notice of what records.**—A purchaser of municipal bonds, in determining whether the aggregate issue exceeds the statutory limit of the assessed value of the property therein has a right to rely on the amount of the assessment, as finally established by the board of equalization, and certified by the county clerk to the auditor of state, without going to the books of the several township or precinct assessors.[1] But, as will hereafter be shown, he has not a right in all cases to rely merely upon recitals in the bonds or statements furnished by particular officers.

§ 87. **When a statute restricting the payment of bonds is void for impairing the obligation of contracts.**—The rights of investors in state or municipal bonds usually become vested under the laws for raising revenue to pay principal and interest existing at the time the bonds were issued, and the obligation of the contract is impaired by subsequent laws which unduly restrict their rights to compel payment. Hence, it was held that the act of the legislature of Missouri, known as the "Cotty Bill," making such change in the laws providing for the payment of county bonds was in contravention of section 10, article 1, of the federal constitution, which prohibits any state from passing any law impairing the obligation of contracts.[2]

The legislature has no power to repeal a statute for the payment of a municipal indebtedness, where such statute has been enacted and was in force when the indebtedness was incurred.[3]

tion, should be considered. Lamar, etc., Co. *v.* City of Lamar, 128 Mo. 202, 26 S. W. R. 1025 and 31 S. W. R. 756.

[1] McLein *v.* Valley Co., 74 Fed. R. 389; Claybrook *v.* Comrs., 117 N. Car. 456, 23 S. E. R. 360.

[2] *In re* Copenhaver, 54 Fed. R. 660; Seibert *v.* Lewis, 122 U. S. 284; Ralls County Ct. *v.* United States, 105 U. S. 733; Bronson *v.* Kinzie, 1 How. 310; Louisiana *v.* New Orleans, 102 U. S. 203; 2 Elliott R. R., § 840. It does not follow, however, that every change in the mere remedy necessarily impairs the obligation of the contract.

[3] Amy *v.* City of Galena, 7 Fed. R. 163, 5 Wall. 705.

§ 88. **Limitation on the power to incur municipal indebtedness does not extend requisite powers.**—The provision that no municipal corporation shall be allowed to become indebted to an amount exceeding five per cent. on the value of the taxable property therein, is a limitation upon the power of the legislature to authorize municipalities to contract indebtedness, and does not operate as a repeal of a clause in a city charter, granted prior to the adoption of the constitution, which prohibits the city from contracting an indebtedness in excess of the amount of five per cent. It was not intended to authorize a city to become indebted to the full amount of the five per cent. without regard to the limitation in its charter as to the extent of its power to create indebtedness.[1]

[1] City of East St. Louis *v.* The People, 124 Ill. 655; People *v.* Bradley, 60 Ill. 390; Kine *v.* Defenbaugh, 64 Ill. 291; Mitchell *v.* Railroad Co., 68 Ill. 286; Law *v.* People, 87 Ill. 385; Hill *v.* City of Chicago, 60 Ill. 86; East St. Louis *v.* Amy, 120 U. S. 600.

CHAPTER V.

GENERAL POWER TO BORROW MONEY.

§ 89. The term "borrowing money" construed.
90. The nature and extent of the power to borrow money.
91. Express power to borrow money construed.
92. Implied power to borrow money.
93. A provision in the city charter that it "may do all other acts as natural persons" construed.
94. The rule in Ohio—Bank of Chillicothe *v.* Chillicothe.
95. The rule in Wisconsin—Mills *v.* Gleason.
96. The rule in Indiana.
97. The rule in Illinois.
98. The rule in Nebraska.
99. The doctrine in Pennsylvania—City of Williamsport *v.* Commonwealth.
100. The doctrine in Pennsylvania criticised by Judge Dillon.
101. Decisions of the New York courts.
102. The rule in New Jersey—Hackettstown *v.* Swackhamer.
103. Judge Dillon's summary.

§ 89. **The term "borrowing money" construed.**—The power of a municipal corporation to make any contract, does not depend upon the place of performance, but upon its scope and object. A city authorized to establish gas works and waterworks, and to gravel its streets, may buy water, coal and gravel beyond its limits, and agree to pay where they are found or elsewhere. The principal power, when expressed, draws to it by necessary implication, the means of its execution. This is a settled rule in the construction of all grants of authority, whether to governments or to individuals. Express authority, therefore, granted to a city to borrow money necessarily implies the power to determine the time of payment, and to issue evidences of indebtedness, to borrow within or without the city, and to agree to pay where borrowed.[1]

A contract, whereby a city agrees that an individual, if the

[1] Meyor *v.* Muscatine, 1 Wall U. S. 384; Evansville Railroad Co. *v.* Evansville, 15 Ind. 395. See, also, Skinker *v.* Butler County, 112 Mo. 332.

latter will pay, or advance, the amount of interest due and to become due on certain bonds of the city already issued, it will pay or refund the amount, is not a "borrowing of money" within the terms or spirit of the charter prohibiting the municipal authorities from borrowing money unless authorized by a prior vote of the citizens, such a contract being only for the payment of a debt.[1]

§ 90. **The nature and extent of the power to borrow money.** —The power to borrow money may be given in express language, in which case the terms and purposes of the grant, will, of course, measure its extent. The power to borrow money does not belong to a municipal corporation as an incident of its creation. To possess such power, it must be conferred by legislation, either express or clearly implied. It does not belong, as a mere matter of course, to local government to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the corporation. Evidence of such indebtedness may be given to the public creditors, but they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation.

The power of borrowing money for general purposes on the credit of the city limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out by revenue derived from taxation, and the presumption is that the grant of the power is intended to confer the right to borrow money in anticipation of receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid for a long time. It is easy for a legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds, and when there is

[1] Gelpcke *v.* City of Dubuque, 1 Wall. (U. S.) 175.

any doubt as to the existence of such power, it ought to be determined against its existence.[1]

§ 91. **Express power to borrow money construed.**—Express power to borrow money will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power to issue evidence of indebtedness, which, according to many of the authorities, may even be in the form of negotiable paper with all the incidents of negotiability.[2]

Although a municipal corporation proper, in the execution of its ordinary corporate powers and the discharge of its corporate duties, may make contracts and create debts, and may, when not restrained by statute, evidence the liabilities thus incurred, yet even if the instrument is made to assume the form of negotiable paper, such paper is always open to defenses in the hands of transferees when it is issued without express authority from the legislature or authority fairly to be implied from the charter or legislation applicable to the municipality.[3]

But express power to borrow money for general purposes not exceeding a specified sum has been held by the supreme court of the United States, upon an examination of the nature of other powers contained in the charter, not to prohibit or

[1] Brenham *v.* German American Bank, 144 U. S. 173; Mayor *v.* Ray, 19 Wall. 468; Mitchell *v.* Burlington, 4 Wall. 270; Larned *v.* Burlington, 4 Wall. 275; Merrill *v.* Monticello, 138 U. S. 673; Gause *v.* Clarksville, 5 Dill. (C. C.) 44; Francis *v.* Howard, 50 Fed. R. 56.

[2] 1 Dillon on Mun. Corp., § 125; City of Williamsport *v.* Commonwealth, 84 Pa. St. 487; Commonwealth *v.* Pittsburg, 34 Pa. St. 496; Seybert *v.* Pittsburg, 1 Wall. 272; City of Galena *v.* Corwith, 48 Ill. 423; Kelley *v.* Mayor, 4 Hill (N. Y.) 263; DeVoss *v.* City of Richmond, 18 Gratt. 338; Evansville, etc., R. R., *v.* Evansville, 15 Ind. 395; Police Jury *v.* Britton, 15 Wall. 566; Mercer Co. *v.* Hackett, 1 Wall. 83; Rogers *v.* Burlington, 3 Wall. 654; Mayor *v.* Imman, 57 Ga. 370; Tucker *v.* City of Raleigh, 75 N. Car. 267; City of Vicksburg *v.* Lombard, 51 Miss. 111; Dorian *v.* Shreveport, 28 Fed. R. 287; Sioux City *v.* Weare, 59 Iowa 95. This is perhaps according to the numerical weight of authority. But see, *post* §§ 112, 113, for recent decisions of the supreme court of the United States limiting or overthrowing this doctrine so far as the right to issue negotiable paper in the strict sense is concerned.

[3] The Mayor *v.* Ray, 19 Wall. 468; Town of Hackettstown *v.* Swackhamer, 37 N. J. L. 191; City of Williamsport *v.* Commonwealth, 84 Pa. St. 487; Gause *v.* Clarksville, 5 Dillon 165; Knapp *v.* Hoboken, 39 N. J. L. 394.

limit the city in incurring an indebtedness for authorized special purposes greater than the sum it was authorized to borrow for general purposes.[1]

§ 92. **Implied power to borrow money.**—The implied powers of the corporation are those only that are necessary to carry into effect the powers expressly granted, although the word "convenient" is sometimes substituted for "necessary." By the word "necessary" is not meant that the object of the corporation could not possibly be attained if the power is denied, but it is meant that the other methods left would be so cumbersome as to be practically inoperative. This principle is applied to all corporations, private as well as municipal.

As to municipal corporations, two distinct classes may arise. The first class is that in which the charter of a municipal corporation confers upon it powers, or imposes upon it duties, in addition to the grant of ordinary corporate powers, of such a character that their purposes can not be fulfilled, by the exercise of the ordinary revenue provisions, because of their requiring the immediate expenditure of large sums of money. The second class is that in which the charter confers only ordinary municipal powers. The power of borrowing money is obviously necessary to the exercise of the express power in the first of these cases, and is, therefore, even admitted by those decisions that deny it in the latter case.

Judge Dillon, in his treatise on municipal corporations, speaking of the subject, uses the following language: "The question of the incidental authority of municipal corporations to borrow money has not been so thoroughly considered and so often decided as to be entirely closed to controversy. In view of the legislative practice to confer in terms all powers so important as this, the dangerous nature of this power, by reason of the temptations it holds out to incur needless debts, and to make extravagant expenditures and the facilities it offers for fraud, and the settled and salutary doctrine that such corporations have no powers but such as are expressly

[1] Hitchcock *v.* Galveston, 96 U. S. 341; United States *v.* Fort Scott, 99 U. S. 152.

conferred, and those which are necessary to effect the objects of the corporation, and those which are incidental to the express grants, the author, where the legislative will is wholly silent, would be strongly inclined to deny the existence of a general implied or incidental power to borrow money.''[1]

§ 93. **A provision in city charter that it "may do all other acts as natural persons" construed.**—A provision in a city charter providing that it "may do all other acts as natural persons" must be restrained to such other acts as are authorized by its charter or the statutes of the state applicable to the city, if any, and can not be construed to remove all the limitations inseparable from corporate existence, and to confer upon the city authority to engage in business of a private nature or to make its power commensurate with those of natural persons. It can not, therefore, be construed to confer an express power to borrow money or issue commercial paper.[2]

§ 94. **The rule in Ohio—Bank of Chillicothe v. Chillicothe.**—The question of implied power to borrow money arose in Ohio as early as 1836. The charter of the town of Chillicothe provided that the mayor, recorder, treasurer and common council, and their successors in office, shall be a body corpo-

[1] 1 Dillon on Munic. Corp., § 117. The following cases favor the existence of the incidental power of municipalities to borrow money: Bank of Chillicothe *v.* Town of Chillicothe, 7 Ohio, pt. 2, p. 31; Mills *v.* Gleason, 11 Wis. 470; City of Williamsport *v.* Commonwealth, 84 Pa. St. 487, 24 Am. R. 208; Sheffield Tp. *v.* Andress, 56 Ind. 157; City of Richmond *v.* McGirr, 78 Ind. 192; Folsom *v.* School Directors, 91 Ill. 402; State, *ex rel.* City of Norfolk *v.* Babcock, 22 Neb. 614, 35 N. W. R. 941; Austin *v.* Colony, 51 Iowa 102, 49 N. W. R. 1051. The following adjudicated cases and authorities are opposed to the existence of such powers: Town of Hackettstown *v.* Swackhamer, 37 N. J. L. 191; Wells *v.* Town of Salina, 119 N. Y. 280; Gause *v.* Clarksville, 5 Dillon 165; 10 Fed. Cases Circuit and District Courts 96; Merrill *v.* Monticello, 138 U. S. 673; The Mayor *v.* Ray, 19 Wall. (U. S.) 468. They can only borrow money for purposes strictly within the line of their duties and then only the amount necessary. Lovejoy *v.* Inhabitants (Me.), 40 Atl. R. 141.

[2] Gause *v.* City of Clarksville, 5 Dillon 165, 10 Fed. Cases 96; Merrill *v.* Monticello, 138 U. S. 673.

rate by the name of "the mayor and commonality of the town of Chillicothe," with capacity to purchase, receive, possess and convey any real or personal estate for the use of the said town of Chillicothe: provided that the clear annual income shall not exceed four thousand dollars. The sixth section of the town charter conferred power to erect and repair public buildings for the benefit of said town and the usual other municipal powers. The right to borrow money was not expressly granted, and the only question in the case was whether it was granted by implication. The case was fully argued and considered by the court. But no authorities were produced, and it was, therefore, considered as an original case involving the question of implied power to borrow money.

The court held that the power to borrow money was an incident to legislative power, and, if it became necessary for the safety and convenience of the town, or to carry into effect the power granted to purchase real or personal property, or to erect or repair public buildings, to borrow money, there could be no objection to passing a law or ordinance to that effect. When passed, it would be obligatory on the corporation, and the money procured would constitute a debt which the corporation would discharge. Such a law would contravene no principle of the constitution, or laws of the state, or of the United States, or any principle contained in the charter of the corporation. To effect other objects than those specified in the charter, money could not, with propriety, be borrowed. But, if it should be, that circumstance could hardly be set up as a matter of defense against an action brought for the recovery of the money. It would rather be a question between the individual corporation and its officers, or it might be between the state and the corporation. Thus, for the purpose of purchasing real estate, erecting and repairing public buildings, cleansing, raising, paving, draining, turnpiking and otherwise keeping streets in repair, contracts must necessarily be made. Ultimate payment, it is true, must be made from taxation. But until money could be thus raised, it might be provided otherwise, and in no way better than by borrowing.[1]

[1] Bank of Chillicothe *v.* Town of Chillicothe, 7 Ohio, part 2, p. 31.

§ 95. **The rule in Wisconsin—Mills v. Gleason.**—In this case the supreme court of Wisconsin followed the Ohio doctrine of the implied power of municipal corporations, as incidental to the execution of the general powers granted by its charter, and in the absence of any constitutional or statutory restrictions, to borrow money and issue its negotiable paper therefor.

There was no special act and no provision in the city charter expressly authorizing the power to borrow, and it was said that without this the power to borrow money did not exist, and could not be claimed as incidental to the execution of the general powers granted by the charter. The charter, however, did confer the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things, for the execution of which money would be necessary as a means. The court held, therefore, that in the absence of any restriction, the power to borrow money would pass as an incident to the execution of those general powers, according to the well-settled rule that corporations may resort to the usual and convenient means of exercising the powers granted; for certainly, no means is more usual for the execution of such objects than that of borrowing money.[1]

§ 96. **The rule in Indiana.**—The rule in Indiana is that the statute of that state, conferring on cities the general power, without restriction, to purchase real estate for the purpose of constructing buildings thereon, confers, by implication, the exclusive right to determine the expediency of the purchase, the power to purchase on credit, and also to issue its negotiable securities for the purchase-money.

Thus, where a city charter expressly granted to the council the power to purchase real estate, it was held, that in the absence of any statutory mode being pointed out for the exercise of such power, it could contract with reference to such power the same as a natural person; and such power was implied from the general unlimited power granted. This rule, the court held, arose from the necessity of the case, and was in

[1] Mills *v.* Gleason, 11 Wis. 470; *v.* Janesville, 10 Wis. 135. State *v.* Madison, 7 Wis. 582; Clark

harmony with the general rule of the law as established by the authorities. The council having the right to purchase the property, in the absence of anything in the charter to the contrary, had the right to purchase it on credit, and having created an indebtedness lawfully, from the very nature of the case would have the right to execute evidences of that indebtedness, and obligations to pay the same. And as to the kind and form of the evidences and obligations to be executed, the council, in the exercise of a sound discretion, must determine, and their determination, in the absence of fraud, is final.[1]

§ 97. **The rule in Illinois.**—The Illinois courts have held that for the purpose of building school-houses, purchasing school sites, or for the repairing or improving the same, school directors, by a vote of the people of their district, are authorized to borrow money, and issue bonds therefor. The power to borrow money carries with it at common law, independent of the statute, the power to give evidence of the loan.[2]

§ 98. **The rule in Nebraska.**—In Nebraska, the statute confers upon cities of the second-class, having a population of more than one thousand and less than five thousand inhabitants, the right to make regulations to secure the general health of the city, and to construct sewers and to regulate their use. Under this authority the city of Norfolk issued eight thousand dollars in bonds on the second day of September, 1887, for the purpose of constructing sewers in said city. The bonds were issued in due form and presented to the state auditor for registration and certification. The auditor refused to register and certify them on the ground that cities of the second-class having less than five thousand inhabitants are not authorized to

[1] City of Richmond *v.* McGirr, 78 Ind. 192; Sheffield School Township *v.* Andress, 56 Ind. 157; School Town of Monticello *v.* Kendall, 72 Ind. 91; Bicknell *v.* Widner School Tp., 73 Ind. 501; City of Lafayette *v.* Cox, 5 Ind. 38; Hardy *v.* Merriwether, 14 Ind. 203; Daily *v.* City of Columbus, 49 Ind. 169; Kyle *v.* Malin, 8 Ind. 34; Rushville Gas Co. *v.* City of Rushville, 121 Ind. 206. But see Merrill *v.* Monticello, 138 U. S. 673.

[2] Folson *v.* School Directors, 91 Ill. 402; School Directors *v.* Sippy, 54 Ill. 287.

issue bonds to aid in the construction of sewers as works of internal improvements. The city of Norfolk applied to the supreme court for a writ of *mandamus* to compel the auditor to register and certify the bonds. The only authority for issuing the bonds was that under the statutes, cities of the second-class containing more than one thousand and less than five thousand inhabitants in their corporate capacities were authorized and empowered to enact ordinances, "to construct and keep in repair culverts, drains, sewers and cesspools, and to regulate the use thereof." The court declared that if it was necessary for the health and convenience of the city to drain the principal streets by the use of underground drains or sewers, the power was given in express terms to do so. To say that this power existed, but that the means to make it effective had been withheld, would simply destroy the authority and nullify the legislative grants. The necessity for great care in the exercise of the power to borrow money by municipal corporations, and that the power so to do should not be held to have been conferred except when expressly given, or when absolutely necessary to carry out and make effective the powers expressly conferred, was conceded by the court. However, the court held that the bonds were legally issued, and, therefore, awarded the writ.[1]

§ 99. **The doctrine in Pennsylvania—City of Williamsport v. Commonwealth.**—This is a leading case on the subject of implied power of a corporation to borrow money to pay pre-existing indebtedness for the purpose of making public improvements, and is elaborately discussed in a very able opinion by the supreme court.

The contention on the part of the city was that all of its bonds known as series A, issued in excess of two hundred thousand dollars authorized by act of the legislature, were illegal and void. In other words, that a municipal corporation possessed no inherent power to issue such bonds, and that in the absence of any such power in its charter, or express legislative authorization, the city was not bound thereby.

[1] City of Norfolk *v.* Babcock, 22 Neb. 614, 35 N. W. R. 941.

The learned court said: "There is a marked distinction in this respect between private and municipal corporations. This distinction has been lost sight of in many of the adjudicated cases, and is perhaps one of the causes of the confusion into which this branch of the law has fallen. As a general proposition the right of private or trading corporations to issue promissory notes, bonds, or other evidences of indebtedness, unless restrained by their charters or the law of the land, may be conceded. The reason is plain. Such corporations are organized for the purposes of trade and business and the borrowing of money and issuing of obligations therefor are not only germane to the objects of their organizations, but necessary to carry such objects into effect. Municipal corporations rest upon a different basis. The purposes of their creation are different. The ends sought to be subserved are the comfort, protection and well-being of the people embraced within the geographical limits of the municipality. They are clothed with certain powers of sovereignty, limited, it is true, but none the less a portion of the sovereignty of the state. Upon the theory that general laws applicable to the entire state are often unsuited to the needs of the city and inadequate to meet its growing wants, and that the local affairs of such communities can be best regulated by those directly interested therein, the state confers upon it a portion of its own sovereignty, retaining a general power of control. The very purpose of the state in creating a municipal corporation is to give it the control of its streets, its police force, its fire department, the arrangements for supplying gas and water, and providing proper sewerage for drainage. These, and many others that might be named, are among the legitimate objects of a municipal corporation, expressly recognized by the text writers, and a long line of decisions which it would be an affectation of learning to cite. It is needless to say that a corporation organized for and intrusted with the local government of the people must of necessity possess great and varied powers. As an illustration, the city of Philadelphia, with a population of more than a million, has a revenue from taxation and other sources more than double the entire amount raised by the state. She is a great

commonwealth within a commonwealth, and her powers for the good of her citizens in the line of her duty, and within her prescribed orbit, are limited only to obedience to the constitution and laws of the state. Yet her express powers are not greater than those usually granted to municipal corporations. Her implied powers include all such as are necessary to carry out the objects for which her charter was granted. This is a cardinal rule, not only in regard to municipal corporations, but also those of a private nature. That there may be a difference in even the implied powers of corporations is possible. An implied power springs from necessity. That which may be necessary for a large city may not be necessary for a small city or borough. That which is not necessary can not be implied. Taken in its broadest sense the power to borrow money and issue bonds therefor can not be said to be among the implied powers of a municipal corporation. For general purposes such power does not exist, for the reason that it is not necessary for the objects for which it was created. Thus it has never been contended that a municipality may borrow money and issue bonds or notes for objects having no necessary relation to the performance of municipal duties. To admit such a principle would be destructive of such organizations and place the tax-payers of the city at the mercy of the first band of plunderers who should happen to obtain control of its affairs. The question for our consideration is, whether the power to issue bonds is one of the inherent powers of a municipal corporation in limited sense; that is to say, for the purpose of providing for such expenditure as is strictly germane to the objects for which such corporations are created.'"[1] A majority of the court held that it was.

§ 100. **The doctrine in Pennsylvania criticised by Judge Dillon.**—Judge Dillon criticises this doctrine as follows: "If the judgment of the court in this case is to be taken as holding that a municipal corporation, merely by virtue of its authority to pave streets, may, without any express power to borrow money, issue its negotiable bonds in advance, and sell

[1] City of Williamsport *v.* Commonwealth, 84 Pa. St. 487, 24 Am. R. 208.

them as a means of raising money to be applied to this purpose; may issue them in any sum it pleases and sell them for any price it can obtain, and that bonds so issued are commercial paper, with all the qualities and incidents of such paper, if such is the doctrine of the court, we feel constrained to say that we are unable, notwithstanding the ability with which it is supported, to regard it as otherwise than unsound and dangerous."[1]

§ 101. **Decisions of the New York courts.**—The power to raise money for municipal purposes, as a rule, never means a power to borrow unless there is other language qualifying or extending its meaning.[2]

The court in Wells *v.* Town of Salina said: "The expenses of the town poor and of the town bridges and of town officers are all town charges, and yet no one will contend that the town could borrow money to meet these charges instead of meeting them in the mode prescribed by statute, by taxation. It is the policy of the law that the town charges shall be met by annual recurring taxation, and thus extravagance and improvidence are in some degree checked, as those who create town charges or are the tax-payers when they arise, must bear the burden of taxation to meet them. It is quite easy for the tax-payers of to-day to create a debt which they are not to feel and which the tax-payers of the future are to discharge. The system of the laws relating to towns requires that all bills for moneys expended or materials furnished or services rendered to the town shall be verified and presented to the board of town auditors and audited by them, and then enforced by warrants of the board of supervisors against the tax-payers of the town. This whole system would be subverted if towns could borrow money upon credit to meet town charges. Then the money would have to be repaid whether the town had the benefit thereof or not, and the wise provisions of the

[1] 1 Dillon on Munic. Corp., § 121.

[2] Wells *v.* Town of Salina, 119 N.Y. 280; Statson *v.* Kepton, 13 Mass. 272; Frost *v.* Inhabitants of Belmont, 6 Allen 152; Claffin *v.* Inhabitants of Hopkinston, 4 Gray 502; Minot *v.* West Roxbury, 112 Mass. 1; Mead *v.* Acton, 139 Mass. 341.

statutes to secure economy and safety by the audit of the accounts would be entirely frustrated. The danger of allowing money to be borrowed on the credit of the town for such a town purpose as we have here is quite clearly illustrated in this case. Here the sum of eight thousand four hundred dollars was authorized to be borrowed to carry on an ordinary litigation, and one thousand five hundred dollars was paid to the attorney long before the action, and thereafter three thousand dollars more was paid to him for his services and expenses, and there remains still a balance due. The bills for services and expenses have never been audited or allowed in the mode prescribed by the statutes. There was no proof upon the trial that the money borrowed was actually needed for the prosecution of that action, or that it was prudently, honestly or wisely used. But even if we should assume that it had been sufficiently established that the town had the full benefit of the money thus borrowed, that would not authorize the maintenance of this action. If a town could be made liable for money borrowed simply because it had been applied for town purposes, then the entire system for the audit and allowance of town charges would be overturned."[1]

The power to contract to pay A ten thousand dollars at the end of the year for doing certain work, and the power to borrow ten thousand dollars of B upon the credit of a year, for the purpose of paying A for doing the work, might seem, at first view, to be substantially identical. The amount is the same, and the time of payment the same; the credit only is different. A little examination, however, will show that there is a very material difference between the two. If the power of the corporation to use its credit is limited to contracting directly for the accomplishment of the objects authorized by law, then the avails or consideration of the debt created can not be diverted to any legitimate purpose. The contract not only creates the fund, but secures its just appropriation. On the contrary, if the money may be borrowed the corporation will be liable to repay it, although not a cent may ever be applied to the object for which it was avowedly obtained. It

[1] Wells *v.* Town of Salina, 119 N. Y. Court of App. 291.

may be borrowed to build a market and appropriated to build a theater, and yet the corporation would be responsible for the debt. The lender is in no way accountable for the use made of the money. It is plain, therefore, that if the policy of limiting the powers and expenditures of corporations to the objects contemplated by their charters is to be carried out, their right to incur debts for those objects must be strictly confined to contracts which tend to their direct accomplishment. And, again, no one can fail to see that to concede to corporations the power to borrow money for any purpose, would be entirely subversive of the principle which would limit their operations to legitimate objects.[1]

The towns of New York have not the general power to borrow money, nor are their officers, in the exercise of their ordinary duties, authorized to issue bonds or any other evidence of indebtedness in the name of the towns represented by them for loans or other debts contracted or incurred on their behalf.[2]

The contention that boards of supervisors have no inherent power to borrow money or to issue negotiable paper accords with the general understanding, and with the tenor of the adjudged cases and the course of legislation, which presupposes the necessity of express legislative sanction, in order to justify the exercise of this authority. In New York the powers of boards of supervisors are not only the subject of express affirmative definition, but for the purpose of confining the action of these bodies to the exercise of enumerated powers, it is declared that "No county shall possess or exercise any corporate powers, except such as are enumerated or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given." The power of borrowing money is incident to the powers of a business corporation, unless excluded by its charter. Boards of supervisors have the recourse of taxation for the raising of money for county purposes. The power to borrow money is not necessary to the execution of powers expressly given. But the denial of these powers to these *quasi*-public corporations also stands strongly upon con-

[1] Ketchum *v.* City of Buffalo, 14 N. Y. 356.

[2] Starin *v.* Town of Genoa, 23 N. Y. 439.

siderations of public policy, and the doctrine that they have no implied power to borrow money is an important safeguard for the protection of political communities against the creation of ruinous liabilities, through the action of incapable, negligent or unfaithful public agents. The power of the board of supervisors to extend the original debt by means of new loans or by renewals of prior obligations, if it exists, must be found in the statute, given either expressly or by implication.[1]

§ 102. **The rule in New Jersey—Hackettstown v. Swackhamer.**—The doctrine in New Jersey, as declared in this case, is that municipal corporations, in the absence of a specific grant of power, do not in general possess the capacity to borrow money, and that a note given for an unauthorized loan can not be enforced, although the money borrowed has been expended for municipal purposes.

It can not be inferred, it is said, that a power to borrow money is an appendage to the usual franchises given to municipal corporations. Such a right can not, in any reasonable sense, be said to be necessary within the meaning of that term as already defined. Under ordinary circumstances it is not certainly indispensable, as common experience demonstrates. In the great majority of instances the municipal affairs are, with ease and completeness, transacted without it. Where charters are granted containing nothing more than the usual franchises incident to municipal corporations, under such conditions, the power to borrow money is not to be deduced. It would be to fly in the face of all experience, said the learned court, to claim that the ordinary municipal operations could not be efficiently carried on except with the assistance of borrowed capital. Without any help of this kind, it is well known that our towns and cities have long been and are now being improved and governed. For the attainment of these ends it has not generally been found necessary to resort to loans of money. The supplies derived annually from taxation have been found amply sufficient for those purposes. It undoubtedly is clear that if the ends of the municipal charter can be

[1] Parker *v.* Board of Supervisors of Saratoga Co., 106 N. Y. 392.

conveniently reached, without a resort to the device of raising moneys by loan, there is not the least legal basis for a claim of the power to obtain funds in that way. Granted the fact that the charter can be executed with reasonable ease and with completeness, the conclusion is inevitable that the power in question can not be called into existence by intendment.[1]

§ 103. **Judge Dillon's summary.**—Judge Dillon, while conceding that the American cases are conflicting and can not be harmonized, sums up his views as to the sound and true doctrine of the power of municipalities to borrow money as follows:

"1. The power to borrow money as a means of raising a fund to make future local improvements, or to carry on the ordinary operations of the municipality, can not be implied from the mere authority to make such improvements or from the usual grants of municipal power. These contemplate that the expense of the execution of the ordinary municipal powers shall be met by the revenues derived year by year from taxation.

"2. It does not follow because banking, trading corporations and other private corporations organized for pecuniary profit are held in this country to possess the incidental power to borrow money, and to issue commercial paper having all the qualities attributed to such paper by the law merchant, that a like power is inherently possessed by public and municipal corporations. The analogy is false and delusive. The purposes of the two classes of corporations, the powers of their officers, and the means of making provision for meeting their liabilities, are all essentially different. The nature of the usual duties devolved by law upon municipalities does not make it necessary to imply the existence of a general power to borrow money and to issue commercial paper. The consequences of recognizing such power, in the extravagance it will stimulate, in the frauds it will engender, and in the onerous indebtedness it will inevitably produce, are alarming to contemplate. The history of the express power given to

[1] Town of Hackettstown *v.* Swackhamer, 37 N. J. L. 191.

municipalities to aid railways by borrowing money and issuing commercial obligations is full of warning and instruction.

"3. The power to issue commercial paper which is unimpeachable in the hands of the holder is not among the ordinary incidental powers of a public or municipal corporation. It must be conferred expressly, or by fair implication, as a necessary, or at least a reasonable and usual, means of executing the particular power to which it is claimed to be incidental.

"4. Express power to borrow money, perhaps in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as, for example, subscriptions to aid railways and other public improvements will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability.

"5. When it is expressly provided by statute that public and municipal corporations shall audit all claims presented, and shall issue to the creditor warrants or orders, and no other provision is made, this will not authorize as a means of payment the issue of negotiable or commercial paper which shall possess all the incidents of negotiability; and if issued, it is subject to all defenses in the hands of a tranferee to which it would be subject in the hands of the original holder.

"6. Although a municipal corporation proper, in the execution of its ordinary corporate powers and the discharge of its corporate duties, may make contracts and create debts, and may, when not restrained by statute, evidence the liabilities thus incurred, yet if the instrument is made to assume the form of negotiable paper, such paper is always open to defenses in the hands of transferees, when it is issued without express authority from the legislature or authority fairly to be implied from the charter or legislation applicable to the municipality."[1]

[1] 1 Dillon on Munic. Corp., § 125; Mayor *v.* Ray, 19 Wall. 468. But see the recent decisions of the supreme court of the United States, reviewed in §§ 112, 113, *post.*

CHAPTER VI.

GENERAL POWER TO ISSUE BONDS.

§ 104. The power to borrow money and to issue bonds distinguished.
105. The power to issue bonds must be expressly conferred by law or clearly implied.
106. Power of county commissioners to issue bonds.
107. Implied power to issue bonds.
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109. The doctrine of implied powers in Lynde *v.* County of Winnebago.
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§ 111. The doctrine of implied powers restated in Mayor of Nashville *v.* Ray.
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113. The doctrine in Benham *v.* German-American Bank.
114. The dissenting opinion in Brenham *v.* German-American Bank.
115. The power to tax does not imply the power to issue bonds.
116. The power to subscribe for stock does not imply the power to issue bonds.
117. The doctrine of the federal courts.

§ 104. **The power to borrow money and to issue bonds distinguished.**—The question of the power of municipal corporations to borrow money and to issue negotiable securities therefor is a different question from the power to borrow money. The power to borrow money and the power to issue negotiable paper, though closely related, are not identical.[1] Hence, it does not follow because a municipality has the right to contract and loan, it has, therefore, the right to issue negotiable bonds and put them on the market as evidences of such loan. To borrow money and to give a bond or obligation therefor, which may be circulated in the market as a negotiable security free from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, different transactions.[2]

[1] Gause *v.* Clarksville, 5 Dillon (C. C.) 165, 10 Fed. Cases, 96.

[2] Merrill *v.* Monticello, 138 U. S. 673.

A law authorizing the electors of a county to empower the commissioners of the county to "borrow money" for the erection of a court-house, does not authorize them to empower such commissioners to issue bonds for that purpose. The authority to issue bonds as an evidence of indebtedness might, perhaps, follow as an incident of the right to borrow money, but, in that case, the amount of money borrowed should equal the amount for which the bonds called.[1]

§ 105. **The power to issue bonds must be expressly conferred by law or clearly implied.**—We have seen, that the implied power of municipal corporations to borrow money to carry on the ordinary operations of a municipal government is a point upon which the American cases are not harmonious. There also appears to be an irreconcilable conflict among the authorities as to the power to issue bonds or other commercial paper having the privileges and exemptions accorded to that class of commercial securities. But, notwithstanding much conflict of opinion has existed in the American courts involving this important subject, it has become the settled doctrine of the supreme court of the United States, in opposition, however, to a considerable number of cases in the various state courts, that there is no power to make and utter commercial paper of any kind unless such power is expressly conferred by law or is clearly implied from some other power expressly given which can not be fairly exercised without it.[2]

When the power of a municipal corporation to issue negotiable paper is called in question, it will not be deduced from uncertain inferences, and can generally be inferred only from language which leaves no reasonable doubt of an intention to confer it.[3]

A distinction has usually been made between municipal cor-

[1] Lewis *v.* Comrs. of Sherman Co., 5 Fed. R. 269; McClure *v.* Oxford Tp., 94 U. S. 429; Orleans *v.* Platt, 99 U. S. 676; Chisholm *v.* City of Montgomery, 2 Woods 584.

[2] Brenham *v.* German-American Bank, 144 U. S. 173; Merrill *v.* Monticello, 138 U. S. 673; Clairborne Co. *v.* Brooks, 111 U. S. 400; Police Jury *v.* Britton, 15 Wall. 566; The Mayor *v.* Ray, 19 Wall. 468.

[3] Coffin *v.* Board of Comrs., 57 Fed. R. 137.

porations, such as incorporated cities, and *quasi*-corporations, such as counties and townships. The powers of such governmental agencies as counties, townships and school districts are generally more strictly construed than those of incorporated municipalities. It is now a settled doctrine that this class of corporations have not the implied power to borrow money and issue negotiable bonds. Direct legislative authority is essential. The supreme court of the United States has declared that mere political bodies, constituted as counties are for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacities, have no power or authority to make or utter commercial paper of any kind, unless such power is expressly conferred upon them by law or clearly implied from some other power expressly given which can not be fairly exercised without it. Thus, it has been held that the power of a county to build a court-house did not involve or imply the authority to issue bonds therefor.[1]

§ 106. **Power of county commissioners to issue bonds.**— County commissioners possess no powers except such as are expressly granted or are incidentally necessary to carry such powers into effect. Counties have no authority at common law to issue bonds. They are *quasi*-corporations, mere governing agencies, charged with certain objects of necessary local administration. The power to issue commercial paper must be conferred by statute, and such power must be exercised in the manner prescribed; but if the authority to issue bonds existed at the time of their issuance, a mere irregularity in its exercise will not invalidate the bonds.[2]

[1] Claiborne Co. *v.* Brooks, 111 U. S. 400; Hill *v.* Memphis, 134 U. S. 198; Young *v.* Clarendon Tp., 132 U. S. 340; Kelley *v.* Milan, 127 U. S. 139; The Mayor *v.* Ray, 19 Wall. 468.

[2] Hamlin *v.* Meadville, 6 Neb. 227; S. C. & P. R. R. Co. *v.* Washington Co., 3 Neb. 30; Stewart *v.* Otoe Co., 2 Neb. 177; People *v.* Buffalo Co., 4 Neb. 150; C., B. & Q. R. R. Co. *v.* County of Otoe, 16 Wall. 667; Marcy *v.* Township of Oswego, 92 U. S. 637.

§ 107. **Implied power to issue bonds.**—The American cases, on the subject of the implied power of municipal corporations to borrow money and execute negotiable securities therefor, are conflicting, and it is almost impossible to harmonize them. An examination of the cases in England and in this country shows considerable diversity of opinion between the English and American courts as to the extent of implied powers of corporations. The English courts have, at all times, wisely set a strong face against an elastic construction of corporate charters. The American courts have rather favored the existence of constructive powers.

In England, if a private corporation wishes to borrow money, the power and the purpose for which, and the condition on which it may be exercised, are expressed in the charter or constituent acts, or in the memorandum and articles of association; and the power is not held to exist unless the charter or articles of association confer it, or unless the nature of the business for which the corporation is chartered or organized raises a necessary or reasonable implication of its existence; but in this country it must be admitted that the courts have held, almost without exception, that all corporations for pecuniary profits, unless specially restrained, may not only borrow money but issue negotiable paper for any corporate debt.[1]

Thus it has been held that the power to borrow money, whether express or implied, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or the creditor, and that such evidences may be in the form of notes, warrants, and perhaps most generally in that of a bond.[2]

A municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohib-

[1] Lucas *v.* Pitney, 27 N. J. L. 221; Town of Hackettstown *v.* Swackhamer, 37 N. J. L. 191; Gause *v.* City of Clarksville, 5 Dillon 165, 10 Fed. Cases 96.

[2] Merrill *v.* Monticello, 138 U. S. 673; Mayor *v.* Ray, 19 Wall. 468; Sheffield School Tp. *v.* Andress, 56 Ind. 157; Board *v.* Day, 19 Ind. 450; Miller *v.* Board, 66 Ind. 162; Hardy *v.* Merriweather, 14 Ind. 203; Mills *v.* Gleason, 11 Wis. 470; State *v.* Madison, 7 Wis. 582; Bank of Chillicothe *v.* Chillicothe, 7 Ohio, pt. 2, 631; Commonwealth *v.* Pittsburg, 34 Pa. St. 496.

ited by law, make a contract for the accomplishment of the authorized purposes and thereby incur indebtedness and issue proper vouchers therefor. This is a necessary incident to the express power granted. But there is a marked legal distinction between the power to give a note to the lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale in open market a bond as commercial security, with immunity in the hands of a *bona fide* holder for value from equitable defenses.[1] However it may be when the power to borrow money is expressly given, it seems clear that where the power to borrow is only implied, a further implication of power to issue negotiable securities can not ordinarily arise solely from the power already implied.[2]

§ 108. **The doctrine of implied power to issue bonds in Police Jury v. Britton.**—The power of the police jury in the parishes of Louisiana, to issue negotiable securities in the exercise of duties imposed upon them, has been considered by the supreme court of the United States. These officers are charged with the supervision and repair of roads, bridges, causeways, dykes, levees, and other highways, and are prohibited by the statute from contracting any debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so contracted. Under legislative authority in 1869, levee warrants had been issued for work done upon the levees to the extent of sixteen thousand dollars. The police jury funded this debt in bonds payable to bearer with coupons attached for the interest, and the question arose, as to whether it could lawfully issue negotiable bonds to take the place of certain orders previously given by it for work done on levees in the parish. The case involved the question as to the scope and effect of an express power in the parish to borrow money. The court held that the police jury had no express authority to issue the bonds in

[1] Merrill *v.* Monticello, 138 U. S. 673; Police Jury *v.* Britton, 15 Wall. 566.

[2] It is seldom, if ever, that a presumption can be based upon a presumption, or an implication upon an implication, especially where that upon which it is based is itself doubtful, yet such would virtually be the effect of any other rule upon this subject.

question, and that if they had any authority it must be implied from the general powers of administration with which they were invested. Therefore, the question directly presented in the case was whether the trustees or representative officers of a parish, or county, or other local jurisdiction invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in the future of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness. Mr. Justice Bradley, speaking for the court, said: "This subject as applied to various municipal bodies has been much discussed in the courts of this country and various conclusions have been reached, depending sometimes upon the peculiar character and statutory powers of the corporation, sometimes upon the character of the objects to be attained, and sometimes upon the naked implication of power supposed to arise from the express power to make expenditures. That a municipal corporation, which is expressly authorized to make expenditures for certain purposes, may, unless authorized by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable consideration that may exist or arise between the parties, and to any modification, abatement, or rescision in whole or in part that may be just and proper in consequence of illegalities, or disregard or betrayal of the public interest. The power to issue such obligations, and thus irretrievably to entail upon counties, parishes and townships a burden for which perhaps they have reached no just consideration, opens the door to immense frauds on the part of petty officials and scheming speculators. It seems, therefore, to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be

implied from the mere authority to make such improvements. It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that the trustees or local representatives of townships, counties, and parishes have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated." And again: "We do not mean to be understood that it requires, in all cases, express authority for such bodies to issue negotiable paper. The power has frequently been implied from other express power granted. Thus, it has been held that the power to borrow money implies the power to issue the ordinary securities for its repayment, whether in form of notes or bonds payable in the future. So, the power to subscribe for stock in a railroad, or to purchase property for a market-house, and other like powers which can not be carried into execution without borrowing money or giving obligations payable in the future, have been held sufficient to raise the implied power to issue such obligations. But in our judgment these implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case. It would be an anomaly justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities."[1]

§ 109. **The doctrine of implied powers in Lynde v. County of Winnebago.**—In Iowa the code of 1851 authorized the county judge sitting as the county court "to provide for the erection and reparation of court-houses, jails and other necessary buildings within and for the use of the county." The statute also provided that the county judge may submit

[1] Police Jury *v.* Britton, 15 Wall. 566.

to the people at a regular or special election, "the question whether money may be borrowed to aid in the erection of public buildings," and other questions not necessary to be mentioned; and that "when the question so submitted involves the borrowing or expenditure of money" it "must be accompanied by a provision to lay a tax for the payment thereof," and that "no vote adopting the question proposed will be of effect unless it adopt the tax also." The judge of Winnebago county in 1860 submitted to the voters of that county the question of levying a tax of seven mills on the dollar for the purpose of building a court-house; the tax to be levied annually, not exceeding ten years, until a sufficient amount was raised for that purpose. No proposition, however, was ever submitted to the voters to borrow money or to issue bonds for that purpose or for any other purpose. The county judge made a contract to build a court-house and issued county bonds to the amount of twenty thousand dollars, which were delivered to the contractor, and were purchased for value by parties who sued the county. The bonds recited that they were issued in pursuance of a vote of the people of the county. There was no power to issue these bonds unless upon a vote first had of the people, upon two questions, one as to borrowing the money to erect public buildings, and the other levying a tax to pay the money so borrowed. Both were essential, by the very terms of the statute, to confer the power to borrow money and issue bonds therefor.

The supreme court of the United States, in passing upon the validity of the bonds, declared that the question submitted to the voters was, "Whether the county judge, at the time of levying the taxes for the year 1860, should levy a special tax of seven mills on a dollar of valuation, for the purpose of constructing a court-house in said county, and said tax to be levied from year to year until a sufficient amount is raised for said purpose, not, however, to exceed ten years." There was the requisite majority in favor of the proposition. It was expressed in this formula that a court-house was to be built, and it was implied that money was to be borrowed to accomplish that object. Otherwise the vote gave no authority which

did not already exist, and was an idle ceremony. The statute authorized an appeal to the voters only that they might give or refuse authority to incur a debt. It could not have been intended that the erection should be delayed until a sum sufficient to pay for the structure had been realized from the tax authorized to be imposed, or that the work should proceed only *pari passu* with the progress of its collection from year to year. What is implied is as effectual as what is expressed.[1]

Viewing the subject in the light of the statutory provisions and of the action of the people, we can not, said the court, "say that the bonds were issued without due authorization." [2]

§ 110. **The dissenting opinion in Lynde v. County of Winnebago.**—Chief Justice Chase and Justices Field and Miller dissented from the judgment of the majority of the court in this case upon the following grounds:

First. That the county judge had no power to issue bonds binding upon the county, without previous authority conferred by a vote of the people. Such is the construction given to the statutes of Iowa, which are supposed to confer such power, by the supreme court of the state, and that construction is obligatory upon us. Here the only question ever submitted to the voters of the county was whether a tax of seven mills on the dollar should be levied for the purpose of building a court-house; and the only power conferred was to levy such a tax. "I can not find in this vote," said Mr. Justice Field, "any authority in the county judge to issue bonds of the county for constructing a court-house, payable at different periods, and then to take up the bonds by issuing new bonds drawing a larger interest than the first, and differing in amount and time of payment, and providing that a failure to pay the interest as it matures shall cause the entire principal to become due."

Second. As the bonds were issued without the authorization of a vote of the people, the county is not estopped to deny their validity by reason of any recitals they contain. The county

[1] United States *v.* Babbit, 1 Black 55.

[2] Lynde *v.* County of Winnebago, 16 Wall. 6; Galveston R. R. Co. *v.* Cowdrey, 11 Wall. 459; Claiborne Co. *v.* Brooks, 111 U. S. 400.

judge was only an agent of the county, acting under a limited and special authority, the exercise of which was supposed to be carefully guarded, and he could not enlarge that authority by representation that he possessed what was never conferred. The statutes of the state never intended to make the liabilities of the counties depend upon the mere statements of any of its officers. The law of agency is not different when applied to the acts of agents of municipal bodies, in a matter so serious and delicate as the contracting of a public debt, and when applied to the acts of agents of private individuals; they must both keep strictly within the limits of their power of attorney or their acts will be invalid. They can not cure any inherent defect in their action arising from want of power by any extent of recitals that they had the requisite authority. In concluding, the learned justice said: "It seems to me that the ruling of the majority of the court in this case, holding that the bonds issued under circumstances attending the issue of these, are valid obligations, binding upon the county, goes further than any previous adjudication towards breaking down the barriers which state legislatures have erected against the creation of debts, and consequent increase of taxation, by careless, ignorant or unscrupulous public officers."

§ 111. **The doctrine of implied powers restated in Mayor of Nashville v. Ray.**—This was a case in which Ray sued the mayor and city council of Nashville, Tenn., to recover the amount of nineteen corporation drafts or orders, ranging from a few dollars in amount to over one thousand dollars, and together amounting, with interest, to over nine thousand dollars. In form they were drawn by the mayor and recorder upon the city treasurer, payable to some person named, or bearer, and were impressed with the city seal. The indorsement by the treasurer was made when the orders were presented to him. Evidence was given by the plaintiff tending to show that it had been the custom for many years, when the treasurer failed to pay such checks on presentation, for him to write his name on the back, with the date of presentation, and after-

[1] Lynde *v.* County of Winnebago, 16 Wall. 6.

wards, in the payment of such checks, to allow interest from that date, and that it was usual to present such checks for indorsement to draw interest when it was known there were no funds for their payment; also, that it was the well-known custom of the proper collecting officers of the corporation to receive such checks for taxes and other dues of the corporation; that at the time these checks were issued, and at the time they were bought by the plaintiff, the city was largely involved in debt, and that many such checks were outstanding unpaid, and were bought and sold in the market, and that nearly all the city taxes were paid therewith; that for sometime before the plaintiff purchased the checks in question the taxes for the support of public schools were collected and paid over to the treasurer of the board of education in such checks. These officers then sold them at eighty cents on the dollar, and with the money discharged the salaries of the teachers of the public schools. The charter of this city was in the usual form, but contained no express power to borrow money. In the court below it was held that the city had authority to issue promissory notes and other securities for lawful debts; that the checks, if signed by proper officers, and for a good consideration, were promissory notes, and that if the usage was to issue these securities by a sale in market, they were obligatory to the city, and though overdue on their face, they would be deemed payable on demand, and not dishonored so as to let in defenses against a holder for value. It excluded evidence offered by the city to show that the council of the city gave no authority for the issue or reissue of the checks, and also to show that one of them had been issued by virtue of a corrupt contract with a member of the council. The case was reversed by the supreme court of the United States, five judges only, out of the eight of which the court was then composed, concurring in the judgment of reversal. Four of those judges placed the judgment on these basic principles: "1. That municipal corporations have not the power, without legislative authority expressly or clearly implied, to borrow money, or to issue notes, bills or other securities of a commercial character, free from equitable defenses in the hands of *bona fide* holders. 2.

That such corporations are of a public character, instituted for purposes of local government, and constitute part of the domestic government of the state; that the power of taxation is given to them for the purpose of raising the means of carrying on their functions, and that the creation of such special power is exclusive of others. 3. That the officers of such a corporation can not, like the officers of a private corporation, create by their acts an estoppel against the corporation, its tax-payers or people, so as to render illegal issues of ordinary city drafts or vouchers (not authorized by law) valid in the hands of holders for value; that such holders are affected with notice of the illegality. 4. That certificates of debt, city warrants, orders, checks, drafts and the like, used for giving to the public creditors evidence of the amount of their claims against the city treasury, are valid instruments for that purpose, and may be transferred from hand to hand; but that they are not commercial paper, in the sense of creating an absolute obligation to pay them free from legal and equitable defenses; and that the holder takes them subject to such defenses.'"[1]

§ 112. **The doctrine in Merrill v. Monticello.**—The town of Monticello, Indiana, issued its negotiable bonds, having ten years to run, to the amount of twenty thousand dollars, the proceeds to be used in aid of the construction of a school-house, and sold them in open market. When they matured, a new issue of like bonds, to the amount of twenty-one thousand dollars, was made, which was also sold in open market, and a part of the proceeds converted by a trustee of the corporation to his own use. The decisive question presented by the record in this case was whether the town of Monticello had authority, under the laws of Indiana, to issue for sale in open market negotiable securities in the form of the bonds and coupons on which recovery was sought.

It was held that the implied power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if it exists at all, does not authorize it to create and issue negotiable securities to be sold

[1] The Mayor *v.* Ray, 19 Wall. 468; The Mayor *v.* Lindsey, 19 Wall. 485.

in the market and to be taken by purchasers freed from equities that might be set up by the maker, and that to borrow money and to give a bond or obligation therefor, which may circulate in the market as a negotiable security freed from any equities that may be set up by the maker of it, are essentially different transactions in their nature and legal effect.[1]

§ 113. **The doctrine in Brenham v. German-American Bank.**—The charter of the city of Brenham, Texas, granted in 1873, provided that "the city council shall have the power and authority to borrow for general purposes, not exceeding fifteen thousand dollars, on the credit of said city; also, that the "bonds of the corporation of the city of Brenham shall not be subject to tax under this act." Under the authority conferred by this charter the city council, in 1879, passed an ordinance entitled, "an ordinance to provide for the issue and sale of fifteen thousand dollars, in coupon bonds of the city, to borrow money for general purposes." Bonds, negotiable in form, and to the full amount authorized by the ordinance, were issued by the city in 1879, and the coupons held by the German-American Bank were from the bonds so issued. The principal contention on the part of the defendant was that it was without authority to issue the bonds, and that they were void for all purposes and in the hands of all persons.

There was nothing in the charter of the defendant which gave it any power to issue negotiable, interest-bearing bonds, of the character of those involved in the case. The only authority in the charter that was relied upon was the power given to borrow money for general purposes, not exceeding fifteen thousand dollars, on the credit of the city. The power given to the defendant by section 4 of article 2 of the constitution (the defendant having a population of less than ten thousand inhabitants at the date of its charter and at the date of the ordinance), was only the power to levy, assess and collect an annual tax to defray the current expenses of its local govern-

[1] Merrill *v.* Monticello, 138 U. S. 673; Police Jury *v.* Britton, 15 Wall. 566; Claiborne Co. *v.* Brooks, 111 U. S. 400; Kelley *v.* Milan, 127 U. S. 139; Young *v.* Clarendon Tp., 132 U. S. 340; Hill *v.* Memphis, 134 U. S. 198.

ment, not exceeding for any one year one-fourth of one per cent. The court held that the city, in exercising its power to borrow not exceeding fifteen thousand dollars on its credit, for general purposes, could give to the lender, as a voucher, for the payment of the money, evidence of indebtedness in the shape of non-negotiable paper, but that this did not include the right to issue negotiable paper or bonds, unimpeachable in the hands of a *bona fide* holder.[1]

§ 114. **The dissenting opinion in Brenham v. German-American Bank.**—Justices Brown, Harlan and Brewer dissented from the conclusion of the majority of the court, the grounds of dissent being stated by Justice Brewer. He reviews the cases cited in the majority opinion, and concludes, from minute examination, that in none of those decided, unless in the case of Rogers *v.* Burlington, was there any question as to the power to issue negotiable securities under an express power to borrow money; and that some of them concede that such a power carries with it authority to give negotiable paper for money borrowed.

In the course of the dissenting opinion the learned justice said: "It seems to us that the court, in the present case, announces, for the first time, that an express power in a municipal corporation to borrow money for corporate or general purposes does not, under any circumstances, carry with it, by implication, authority to execute a negotiable promissory note or bond for the money so borrowed, and that any such note or bond is void in the hands of a *bona fide* holder for value. There are, perhaps, few municipal corporations anywhere that have not, under some circumstances, and within prescribed limits as to amount, express authority to borrow money for legitimate corporate purposes. While this authority may be abused, it is often vital to the public interest that it be exercised. But if it may not be exercised by giving negotiable

[1] Brenham *v.* German-American Bank, 144 U. S. 173; Police Jury *v.* Britton, 15 Wall. 566; Claiborne Co. *v.* Brooks, 111 U. S. 400; Concord *v.* Robinson, 121 U. S. 165; Kelley *v.* Milan, 127 U. S. 139; Norton *v.* Dyersburg, 127 U. S. 160; Young *v.* Clarendon Tp., 132 U. S. 340; Hill *v.* Memphis, 124 U. S. 198; Merrill *v.* Monticello, 138 U. S. 673.

notes or bonds as evidence of the indebtedness so created—which is the mode usually adopted in such cases—the power to borrow money, however urgent the necessity, will be of little practical value. Those who have money to lend will not lend it upon mere vouchers or certificates of indebtedness. The aggregate amount of negotiable notes and bonds executed by municipal corporations for legitimate purposes, under express power to borrow money simply, and now outstanding in every part of the country, must be enormous. A declaration by this court that such notes and bonds are void because of the absence of express legislative authority to execute negotiable instruments for the money borrowed, will, we fear, produce incalculable mischief. Believing the doctrine announced by the court to be unsound, upon principle and authority, we do not feel at liberty to withhold an expression of our dissent from the opinion."[1]

§ 115. **The power to tax does not imply the power to issue bonds.**—The power which the statute of Tennessee confers upon a county in that state to erect a court-house, jail and other necessary county buildings, does not authorize the issue of commercial paper as evidence or security for a debt contracted for the construction of such a building.[2]

A grant to a municipal corporation of power to appropriate moneys in aid of the construction of a railroad, accompanied by a provision directing the levy and collection of taxes to meet such appropriation, and prescribing no other mode of payment, does not authorize the issuing of negotiable bonds in payment of such appropriation.[3]

In Mississippi, as a general rule, the boards of supervisors of counties have no other financial powers than "to levy such taxes as may be necessary to meet the demands of their respective counties," and to "direct the appropriation of the money that may come into the treasury." This, it has been held by the highest court of the state, gives no power to bor-

[1] Brenham *v.* German-American Bank, 144 U. S. 173.

[2] The Mayor *v.* Ray, 19 Wall. 468; Police Jury *v.* Britton, 15 Wall. 566.

[3] Concord *v.* Robinson, 121 U. S. 165.

row money.[1] The policy of the state from its earliest history seems to have been to require municipal organizations to meet their current liabilities by current taxation. It was expressly declared that "the grant of power to such a body of extraordinary character, such as is not embraced in the general scope of its duties, must be strictly construed."[2] This doctrine received the approval of the supreme court of the United States in the case of Wells *v.* Supervisors. Chief Justice Waite, delivering the opinion of the court, said: "The controlling question in this case is whether there is authority in law for issuing the bonds to which the coupons sued on were attached. If there was not, it has always been held that no recovery can be had in an action on the bonds or coupons. It is also settled that unless the power to issue bonds for the payment of municipal subscriptions to the stock of railroad companies is given in express terms, or by reasonable implication, no obligation of that kind can be created."[3]

An act of the general assembly of Missouri, approved January 4, 1860, authorized counties, towns and cities to subscribe to the stock of a railroad company which it incorporated and to issue bonds therefor. The seventh section enacted that "upon the presentation of a petition of the president and directors of said company to the county court of said county through which said road may be located, praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles, on either side of said road; that the inhabitants thereof are desirous of taking stock in said road, and of voting upon themselves a tax for the payment of the same,—it shall be the duty of said county court to order an election therein, and shall prescribe the time, place and manner of holding said election; and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax, which shall be kept separate from all other funds and appropriated to no other

[1] Beaman *v.* Leake Co., 42 Miss. 247.

[2] Hawkins *v.* Carroll Co., 50 Miss. 735.

[3] Wells *v.* Supervisors, 102, U. S. 625.

purpose, and as fast as collected shall cause the same to be paid to the treasurer of said company." It was held by the supreme court of the United States that the affirmative vote of the inhabitants of such a strip authorized the county court to levy, collect and pay to the treasurer of the company such special tax, but it did not create a debt of the county, as such, for which bonds might be issued under that act or the act of March 24, 1868, authorizing "counties, cities, and incorporated towns to fund their respective debts."[1]

§ 116. **The power to subscribe for stock does not imply the power to issue bonds.**—The act of the legislature of Missouri, of February 9, 1857, to incorporate the Alexandria and Bloomfield Railroad Company, gave no authority to any town of the state to issue bonds for stock subscribed by it. The fourteenth section, which is the one upon which plaintiff relied, empowered the county court of a county in which any part of a railroad may lie to subscribe to stock of the company, to invest its funds in that stock, or issue the bonds of the county to raise the funds to pay for the stock thus subscribed, to take proper steps to protect the interest and credit of the county and to appoint an agent to represent the county and receive its dividends. The same section also empowered any incorporated city or town to subscribe for stock of such railroad and to appoint an agent to represent its interest, give its notes and receive its dividends, and take proper steps to guard and protect its interest. But it did not authorize the town to issue any bonds for the stock thus subscribed. It left the town to pro-

[1] Ogden *v.* County of Daviess, 102 U. S. 634. Chief Justice Waite, delivering the opinion of the court, used the following language: "It is claimed that authority for the issue of the bonds can be found in this law. We do not agree to this. Neither the county, nor a city, nor a town took the stock now in question. The county did not owe any debt The taxable inhabitants of the 'strip of country' had authorized to tax themselves for the stock. In this way they could bind themselves; but that did not create a debt of the county, as such for which funding bonds might be issued. The debt, if any, was of the 'strip' only, and not the county. As no bond could be issued under the original vote, the county assumed no obligation whatever. The county court and other officers of the county could be compelled to levy, collect and pay over the tax, but that was all the county or its officers were required to do."

vide for the payment of the stock in the ordinary way in which debts contracted by a town are met, that is, by funds arising from taxation. "It is well settled that the power to subscribe for stock in railways is to be construed strictly and not to be extended beyond the terms of the law. While a municipal corporation, authorized to subscribe for the stock of a railroad company or to incur any other obligation, may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation. Such paper in the hands of innocent parties for value can not be enforced without reference to any defense on the part of the corporation, whether existing at the time or arising subsequently. Municipal corporations are established for purposes of local government, and in the absence of specific delegation of power can not engage in any undertakings not directed immediately to the accomplishment of those purposes. Private corporations created for private purposes may contract debts in connection with their business, and issue evidences of them in such form as may best suit their convenience. The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court."[1]

Thus, it has been held by the same court that mere authority given to a municipality to subscribe for stock in a railroad company does not carry with it the implied power to issue bonds therefor, especially where special provisions are made for paying the subscription by taxation.[2]

A municipal corporation, in order to exercise the power of becoming a stockholder in a railroad corporation, must have such power expressly conferred by a grant from the legislature; and even such power does not carry with it the power to issue negotiable bonds in payment of the subscription, unless the

[1] Hill *v.* Memphis, 134 U. S. 198. [2] Norton *v.* Dyersburg, 127 U. S. 160.

latter power is expressly, or by reasonable implication, conferred by statute.[1]

The commissioners or board of supervisors of a county, in the exercise of their general power as such, have no authority to subscribe stock to railroads, and bind the people of the county to pay bonds issued for that purpose without special authority conferred upon it by the legislature.[2]

In a late case, where the subject was drawn in question, Mr. Justice Lamar, speaking for the court, said: "By an unbroken current of decisions by this court and by all other courts, too numerous to mention, it is a settled law that a municipality has no power to make a contract of this character, except by legislative permission. It is manifest that, such being the case, the legislature, in granting such permission, can impose such conditions as it may choose; and even where there is authority to aid a railroad, and incur a debt in extending such aid, it is also settled that such power does not carry with it any authority to execute negotiable bonds except subject to the restrictions and directions of the enabling act."[3]

§ 117. **The doctrine of the federal courts.**—Whether a municipal corporation possesses the power to borrow money and to issue negotiable securities depends upon a true construction of its charter and the legislation of the state applicable thereto. A municipal corporation has no incidental or inherent authority under the usual grants of municipal powers as a means of discharging its ordinary municipal functions. Such authority may, however, be inferred from special and extraordinary powers which require the expenditure of unusual sums of money, when it is usual to execute such powers by means of borrowing money and issuing negotiable securities therefor,

[1] Kelley *v.* Milan, 127 U. S. 139.

[2] Sheboygan Co. *v.* Parker, 3 Wall. 93; Young *v.* Clarendon Tp., 132 U. S. 340.

[3] Young *v.* Clarendon Tp., 132 U. S. 340; Wells *v.* Supervisors, 102 U. S. 625; Claiborne Co. *v.* Brooks, 111 U. S. 400; Kelley *v.* Milan, 137 U. S. 139; Daviess Co. *v.* Dickinson, 117 U. S. 657; Marsh *v.* Fulton Co., 10 Wall. 676; Ottawa *v.* Caney, 108 U. S. 110; 2 Elliott R. R., §§ 839, 875, 876.

and when upon the whole legislation applicable to the municipality such appears to have been the legislative intent.[1]

In Gause *v.* City of Clarksville, Judge Dillon has carefully reviewed all the leading American and English authorities touching the implied power of the municipalities to borrow money and issue negotiable securities therefor, and his view, so far as we are able to determine, has become the settled doctrine of the federal courts. The facts as disclosed in this case show that the city of Clarksville, Missouri, by its charter, had power to erect, repair and regulate wharves, and "to open, clear, regulate, grade or improve the streets of the city." And had power to levy taxes on the property in the city not exceeding one-fourth of one per cent. Three classes of bonds were issued and denominated as "Wharf improvement bonds," "Street improvement bonds," and "Road improvement bonds." They were negotiable in form but did not state the purpose for which they were issued. It was alleged, in the petition in the suit brought upon these bonds, that the first were made for money borrowed for the city, for the purpose of erecting and repairing wharves in the corporate limits of the city, and that the second class were made for money borrowed for the purpose of opening, clearing, paving and improving the streets of the city. The charter contained no express power either to borrow money or to execute negotiable bonds.

After discussing the leading American and English cases upon the implied power of municipalities to issue negotiable securities and the further important fact that under the decisions of the supreme court of the United States, when these securities are issued they can not be impeached in the hands of *bona fide* holders for value, the learned court said: "Whether we consider the question in the light of the nature and object of the ordinary grants of municipal power or in the light of the purposes which led to the invention and which sustained the use of negotiable paper with the qualities attributed to it

[1] Gause *v.* Clarksville, 5 Dillon 165, 10 Fed. Cases, Circuit and District Courts 96; Francis *v.* Howard Co., 50 Fed. R. 44; Dorian *v.* City of Shreveport, 28 Fed. R. 287; Morton *v.* City of Nevada, 41 Fed. R. 582; Deland *v.* Platt Co., 54 Fed. R. 823.

by the law-merchant, we are alike left to the conclusion that the mere power to create a municipal liability for ordinary municipal purposes does not carry with it as an incident the authority to raise loans by the issue and sale of commercial obligations. The implied power to issue vouchers or evidences of indebtedness for authorized and valid municipal debts undoubtedly exists, and it may be true that such vouchers or evidences of indebtedness, though put in the form of negotiable paper, are not, for that reason, void, but if not void it is clear that they derive no additional force from that circumstance. The only safe as well as sound doctrine is, that there is no power in a municipal corporation as incidental to the execution of its ordinary duties to invest its vouchers or notes or bonds with the character of commercial paper. We are not now referring to municipal bonds, negotiable in form, issued by express legislative authority; these possess, according to the settled law of this country, all of the incidents of commercial paper. We have looked closely into the American cases against municipal and public corporations, which hold that it is incidental to the power to create a debt to give a note or bond in payment of it, but we have found no judgment which holds that the note or bond thus issued partakes of that quality of commercial paper which protects an innocent holder for value from defenses or equities to which it would be subject in the hands of the payee. What we wish distinctly to hold is that this supreme and dangerous attribute of commercial paper can not be imparted to the issues of municipal corporations, whatever their form, unless the power to do so is plainly conferred, either expressly or by implication, by the legislature, and that no such implication exists in respect to debts or liabilities arising from the discharge of ordinary municipal duties. Sound policy and sound legal principles are generally coincident. And if the power to issue negotiable paper is needful or expedient for our municipalities, let it be given to the legislature that can prescribe the limits, purposes and conditions of its exercise, and provide for the payment of the liabilities thus authorized. And, finally, the argument against the existence of general implied power in

municipalities to issue commercial paper, becomes as it seems to us, absolutely conclusive in view of this rule, wisely settled, that corporate powers, especially powers whose exercise looks to the creation of public burdens, are to be strictly construed, and that however convenient at times such a power might be, it is one which is not necessary (as shown by universal experience and practice in England and generally in this country) to enable the corporation to exercise its ordinary functions or to carry into effect the purposes for which it was created. It is, therefore, a power which does not exist."

CHAPTER VII.

GENERAL POWER AND PURPOSES OF TAXATION.

§ 118. General rules governing the the power of taxation.
119. General limitations upon the power of taxation.
120. Limiting the power of municipal corporations to levy taxes in discharge of pre-existing obligations impairs the obligation of contracts.
121. Illustrations of the subject.
122. Limitations upon the power of taxation to pay bonded indebtedness.
123. Implied obligation to levy tax to pay municipal indebtedness.
124. Effect of failure to make levy when bonds are issued.
§ 125. Waiver of annual tax levy for the payment of indebtedness.
126. As to the power to pay debts created in violation of the constitution.
127. Special power to levy tax to pay municipal warrants.
128. General purposes of taxation.
129. Purposes of taxation, by whom determined.
130. General rules to determine the purposes of taxation.
131. The rule in Iowa.
132. The rule in Kansas.
133. The rule in New Hampshire.
134. Examples of public purposes.

§ 118. **General rules governing power of taxation.**—The power to tax is a legislative function exclusively, and can not be exercised except in pursuance of legislative authority. The court has no taxing powers, and can impart none to municipal authorities. It has no jurisdiction to coerce the levy of a tax, except where the law has made it the clear and absolute duty of the proper authorities of the municipality to levy such tax.[1]

The power of taxation has been declared to be an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects, therefore, over which the sovereign power of the state extends are, in its discretion, legitimate subjects of taxation; and this power may be carried to any extent to which the government may choose to carry it. The only security against the abuse of this power is found in the struc-

[1] Board of Commissioners *v.* King, 67 Fed. R. 202, 14 C. C. A. 427.

ture of the government itself. In imposing a tax the legislature acts upon its constituents. That is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of the government can not be limited they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse.[1]

In respect to the kind of tax which shall be laid, and also in regard to the objects which have been placed under its burdens, the legislature, as the representative of the sovereign people, must exercise its judgment and discretion, having in view the needs and conditions of the country. But the power to tax is of the broadest extent.

Justice Miller of the supreme court of the United States declared that "the power to tax is the strongest and most pervading of all the powers of government, reaching directly or indirectly to all classes of the people."[2]

Chief Justice Marshall, in a celebrated case declared that "The power to tax involves the power to destroy."[3]

A striking illustration of the truth of this proposition is seen in the fact that the existing tax of ten per cent., imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every state bank of circulation within a year or two after the passage of the act.

§ 119. **General limitations upon the power of taxation.**— Vast as is the power of the government to levy taxes upon its citizens, there are nevertheless limitations upon it of a very distinct and positive character, which inhere in the very nature of the power itself. Some of the limitations are commonly declared in the written constitutions, but the declaration is often rather from abundant caution than from any other necessity,

[1] McCulloch *v.* The State of Maryland, 4 Wheat. 316. The power of the legislature may, however, be limited by the constitution, which is the highest act of the sovereign people.

[2] Loan Association *v.* Topeka, 20 Wall. 655.

[3] McCulloch *v.* Maryland, 4 Wheat. 428.

as many of the limitations are equally imperative, whether thus declared or not.

In some cases the courts, in the exercise of their ordinary jurisdiction, may and do enforce the restrictions; in others it is beyond their power to do so. Whether this may be done in any given case will depend upon whether the question which the case presents is or is not judicial.[1]

In several states the constitution requires that every statute imposing a tax shall state distinctly the object of the same, to which it only shall be applied. No power is lodged in the legislature of any state to override such constitutional provisions imposed as a limitation upon its authority by the people themselves, in framing their constitution.

The power to impose taxes, like any other branch of the legislative authority, must be exercised by the legislature itself, and can not be delegated to ministerial officers, or even to another department of the government.[2]

§ 120. **Limiting the power of municipal corporations to levy taxes in discharge of pre-existing obligations impairs the obligation of contracts.**—All legislative acts passed after the creation of a valid debt by a county or other municipal corporation, which, if enforced, would deprive it of the means of payment to any considerable extent, such as a law materially diminishing its powers of taxation, are void, as being in conflict with that provision of the federal constitution which declares that no state shall pass any law impairing the obligation of contracts. Thus, where, prior to the adoption of the present constitution of Illinois, a county was authorized by law to issue its bonds in aid of the construction of railways, bearing interest, with power to levy such taxes as were necessary to pay the accruing interest and the principal when due, and did issue such bonds, a subsequent limitation of the taxing power of the county which operated to deprive it of the means to meet

[1] Loan Assoc. *v.* Topeka, 20 Wall. 655; Cooley on Taxation, 41.

[2] Cooley on Const. Lim., 117; Dillon on Mun. Corp., § 60, 567, 618.

its obligations as to such outstanding indebtedness, was declared void, as impairing the obligation of contracts.[1]

It is, indeed, a general, if not a universal rule, that the powers which a municipality had when the debt was contracted can not subsequently be materially lessened to the prejudice of the creditor.[2]

§ 121. **Illustrations of the subject.**—Even if the state sympathizes with the debtor municipality and attempts to aid it by limiting its power to tax so that the corporate debts can not be paid by taxes raised within the legal limits, the courts will hold that such limitation of a taxing power is an impairment of the obligation of contracts within the meaning of the federal constitution, which provides that no state shall pass any laws impairing the obligation of contracts. Where the state has conferred the power to create debts and to levy taxes for their satisfaction, it impliedly contracts with those who become creditors that the power so conferred shall not be unduly restricted to their prejudice while their demands remain unpaid.[3]

A county in Missouri levied and collected taxes for the purpose of paying interest on certain bonds issued by it, and thereafter litigation arose as to their validity, and an act was passed by the state legislature authorizing the county court to loan the fund collected, but not specifying the time for which loans might be made. Accordingly a loan was made for four years to A. Before the expiration of that time a bondholder recovered final judgment against the county, execution was issued, and A was served with a writ of garnishment. The garnishee answered that the debt from her to the county was not due, and stated the facts. It was held by the

[1] Peoria, etc., Railroad Company *v.* The People, 116 Ill. 401; Wolff *v.* New Orleans, 103 U. S. 358; Van Hoffman *v.* City of Quincy, 4 Wall. 535; Louisiana *v.* Pillsbury, 105 U. S. 278.

[2] Brodie *v.* McCabe, 33 Ark. 690; Lilly *v.* Taylor, 88 N. Car. 489; Goodale *v.* Fennell, 27 Ohio St. 426; People *v.* Common Council, 140 N. Y. 300; McGahey *v.* Virginia, 135 U. S. 662; Edwards *v.* Kearzey, 96 U. S. 595; 2 Elliott R. R., § 840.

[3] Von Hoffman *v.* Quincy, 4 Wall. 535; City of Galena *v.* Amy, 5 Wall. 705; Riggs *v.* Johnson Co., 6 Wall. 166; Rees *v.* Watertown, 19 Wall. 107; United States *v.* Jefferson Co., 5 Dill. 310; Devereaux *v.* City of Brownsville, 29 Fed. R. 742.

United States circuit court for the district of Missouri: First. That said act only authorized the county court to invest the fund in question subject to call, or until the litigation was concluded. Second. That if construed to authorize loans for a longer period it would clearly have the effect of impairing the obligation of the contract between the county and the bondholder, and, therefore, be unconstitutional and void. Third. That said funds, when paid into the county treasury, became trust funds for the payment of interest upon said bonds, and that it was the duty of the county authorities to apply them to that purpose as soon as the bonds were held valid. Fourth. That A should be presumed to have known the provisions of the statute under which the loan was made, and that the plaintiff was entitled to judgment against her for the sum borrowed, and any interest thereon which might be unpaid.[1]

§ 122. **Limitation upon the power of taxation to pay bonded indebtedness.**—Where a bonded debt is authorized, and the power of taxation is limited to the special tax designed in the act, there is no power to levy a greater tax than the one thus specially limited; and if there is no statute giving power to issue bonds, the municipality can not be compelled to raise a tax to pay them.[2]

The rule is also well settled that a municipality can not raise a tax to pay indebtedness unless it has express or implied power to levy a tax for that purpose.[3]

§ 123. **Implied obligation to levy tax to pay municipal indebtedness.**—Notwithstanding a municipality can not exceed a limitation imposed by the legislature, and can only be compelled to exercise the powers conferred upon it by the laws of

[1] George *v.* Ralls Co., 8 Fed. R. 647.

[2] United States *v.* County of Clark, 96 U. S. 211; United States *v.* County of Macon, 99 U. S. 582; Harshman *v.* Knox Co., 122 U. S. 306; Comrs. *v.* Loague, 129 U. S. 493; McPherson *v.* Foster, 43 Iowa 48; Williamson *v.* City of Keokuk, 44 Iowa 88; People *v.* Jackson County, 92 Ill. 441; Sykes *v.* Columbus, 55 Miss. 444; State *v.* Macon Co. Ct., 68 Mo. 29; East St. Louis *v.* Amy, 120 U. S. 600; Clay Co. *v.* McAleer, 115 U. S. 616.

[3] United States *v.* County of Macon, 99 U. S. 582; State *v.* Guttenberg, 39 N. J. L. 660; M. E. Church, *In Re*, 66 N. Y. 395.

the state, yet a creditor is entitled to have the whole power of the corporation exerted for the payment of the judgment.[1]

Although a city council has a discretion as to the amount of tax which it is authorized to levy for ordinary purposes, it must, if necessary, exercise all the power which it has to pay a judgment obtained against the municipality.[2]

The supreme court of the United States has declared that notwithstanding a legislative act is merely permissive in its language, a power thus conferred is mandatory and imposed as a positive and absolute duty, if its exercise is necessary in order to pay judgments rendered against a municipality.[3]

But in all such cases the rights and remedies of municipal creditors must be considered with reference to the legislation under which the debts were created. If the legislature authorizes the creation of a debt and provides no mode for its payment, it must be inferred that the debt is to be paid by taxation for that purpose, if there is nothing to rebut such intention.[4]

§ 124. **Effect of failure to make levy when bonds are issued.** —The United States circuit court of appeals has held that the fact that no taxes have been levied to pay interest and sinking fund before the issuance of bonds, as required by the statutes of Texas of 1873, did not render the bonds void, which were issued to procure suitable grounds and erect a court-house and jail thereon, at an expense not exceeding seventy-five thousand dollars, to be paid with county bonds, because the commissioners had full power to contract the debt, and the duty was imposed on the county government to execute the bonds and provide for the interest and sinking fund, and the failure of

[1] Butz *v.* City of Muscatine, 8 Wall. 575; Coy *v.* Lyons City, 17 Iowa 1; Commonwealth *v.* Pittsburg, 34 Pa. St. 496.

[2] Iowa Railroad Co. *v.* County of Sac, 39 Iowa 124.

[3] Supervisors *v.* United States, 4 Wall. 435; Memphis *v.* Brown, 97 U. S. 300; United States *v.* Memphis, 97 U. S. 284; Memphis *v.* United States, 97 U. S. 293; Robinson *v.* Supervisors, 43 Cal. 353; People *v.* Supervisors, 12 Johns. 414.

[4] United States *v.* New Orleans, 98 U. S. 381; Kelley *v.* Milan, 127 U. S. 139; Norton *v.* Dyersburg, 127 U. S. 160.

the county authorities to perform their duty at the time specified could not affect the validity of the bonds.[1]

§ 125. **Waiver of annual tax levy for the payment of indebtedness.**—In an action against a municipality it appeared that the relator recovered judgments against it amounting to more than twenty-five thousand dollars. At the time these judgments were recovered the relator had a right to insist upon an annual levy of a tax of one per cent. to apply upon the principal, and of one per cent. to apply upon the interest of such indebtedness. It was held on an application for a mandamus, more than fifteen years after two of said judgments had been entered, that the municipality would not be required to levy and collect in one year sufficient taxes to pay the whole amount due, but that it would be required to levy a tax of one per cent. to apply in the extinguishment of the principal, and one per cent. to apply in the extinguishment of the interest on the indebtedness, each year until the whole amount was paid.[2]

§ 126. **As to the power to pay debts created in violation of the constitution.**—Where the indebtedness of a municipal corporation exceeds the constitutional limitation of five per centum of the valuation of taxable property, the corporation will be enjoined from levying and collecting a tax for the purpose of paying an additional indebtedness incurred before such levy in violation of the constitution.[3]

The constitution of Nebraska prohibits a county board from levying taxes which, in the aggregate, exceed one and one-half dollars per one hundred dollars valuation, unless authorized by a vote of the people of the county.[4]

§ 127. **Special power to levy tax to pay municipal warrants.**—When a municipality is authorized to levy a given rate of tax for general municipal purposes, no holder of municipal warrants or of a judgment rendered thereon has the right to demand that a special tax shall be carved out of the general

[1] Marion Co. *v.* Coler, 67 Fed. R. 60.
[2] Amy *v.* City of Galena, 7 Fed. R. 163; Galena *v.* Amy, 5 Wall. 705.
[3] Howell *v.* City of Peoria, 90 Ill. 104.
[4] State *v.* Weir, 33 Neb. 35.

rate and levied for the exclusive purpose of paying his warrants or judgment, unless the statute requires it and leaves the municipal authorities no discretion in the premises.[1]

§ 128. **General purposes of taxation.**—One invariable limitation upon the power of taxation is that it must always be exercised for the benefit of the public, never for the advantage of individuals. It is immaterial that such a limitation may not be expressed in the constitution. It follows as a necessary implication from the nature of the taxing power that the purposes for which money may be raised in this manner must be public purposes, otherwise the law will be invalid.[2] The decision to levy a tax for a given purpose involves the legislative conclusion that the purpose is one for which a tax may be laid; in other words it is a public purpose. But the determination of the legislature upon this question is not like its decision on ordinary questions of public policy, conclusive either on the other departments of the government, or on the people. The question what is and what is not a public purpose, is one of law; and though, unquestionably, the legislature has large discretion in selecting the object for which taxes shall be laid, its decision is not final. In any case in which the legislature shall have clearly exceeded its authority in this regard, and levied a tax for a purpose not public, it is competent for any one, who, in person, or property, is affected by the tax to appeal to the courts for protection.[3]

Given a purpose or subject for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax which is levied or things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as for the support of the government, the prosecution of war, or the national defense, any limitation is unsafe. The entire resources of the people should be, in some instances, at the disposal of the government. But this almost unlimited power of the government can as readily be employed

[1] Board of Comrs. *v.* King, 67 Fed. R. 202.

[2] Black's Const. Law, 336.

[3] Cooley on Taxation, 42.

against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised. The learned Justice Miller said: "To lay, with one hand, the power of the government on the property of the citizens, and with the other to bestow it on favored individuals, to aid private enterprises and build up private fortunes, is none the less a robbery because it was done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."[1]

Chief Justice Black, of the supreme court of Pennsylvania, declared that the legislature has no constitutional right to create a public debt, or to levy a tax, or to authorize any municipal corporation to do it in order to raise money for a mere private purpose. No such authority passed to the general assembly by the general grant of legislative powers. This would not be legislation. Taxation is a mode of raising money for public purposes. When it is prostituted to objects in no way connected with the public interest or welfare it ceases to become taxation and becomes plunder. Transferring money from the owner of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them.[2]

§ 129. **Purposes of taxation, by whom determined.**—It may not be easy to draw the line of demarcation in all cases, so as to determine what is a public purpose and what is not. It is undoubtedly the duty of the legislature, which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of public use; and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interfering cogent. And in deciding whether, in a given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by

[1] Loan Association *v.* Topeka, 20 Wall. 655; Cooley on Taxation, 69.

[2] Sharpless *v.* Mayor of Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759.

the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, and what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this, and is sanctioned by time, and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government; though this may not be the only criterion of rightful taxation.[1]

§ 130. **General rules to determine the purposes of taxation.**— A few general rules may be laid down, which may determine the lines on which the inquiry may be conducted and the tests usually applied to determine the question as to what purposes are considered to be public or private. In the first place, in order that an object of taxation should be public, it is necessary that it should be for the benefit and advantage of the people generally. But it is not necessary to show that a direct and pecuniary benefit will accrue to each person to be affected by the tax. All citizens are interested in the general welfare of the state. Whatever, therefore, promotes the prosperity of all the people is an advantage and benefit to each. All persons are vitally concerned in the peace, order and good government of the country in which they live.[2]

In the next place, although the direct object of the tax may be for the benefit and advantage of an individual, it does not always follow that the general object may not be for the public welfare. For the object in conferring this benefit upon an individual may be intimately connected with the advantage of the whole people. To illustrate, when the government assumes to make grants of land or appropriate money as bounty, or to pay pensions to retired or disabled officers, civil or military, it is true that the person to receive the gift or donation is most directly concerned. But the grant or bounty is made

[1] Savings and Loan Association *v.* Topeka, 20 Wall. 655; Allen *v.* Inhabitants of Jay, 60 Me. 124, 11 Am. R. 185; 58 Me. 590; Commercial National Bank *v.* City of Iola, 2 Dillon 353; National Bank of Cleveland *v.* Iola, 9 Kan. 689.

[2] New York, L. E. & W. R. Co. *v.* Comrs., 48 Ohio St. 249, 27 N. E. R. 548.

upon consideration of public services rendered or to be rendered, and is calculated and intended to promote the efficiency and fidelity of the public service by extending the hope of a reward in certain contingencies. The only question as to such laws is, therefore, one of wisdom and expediency; it is a political question, not a legal question.

In the next place, a public purpose means a purpose which concerns the aggregate of the people within the jurisdiction of the government which authorizes the assessment. For example, the construction of a system of sewers, or parks, or waterworks in a city is a public purpose, so far as concerns the residents of the city, and therefore a legitimate object of taxation. But it is not a public purpose as regards the people of the state at large. Hence, the tax area must be restricted to the district or locality to be benefited thereby. It would be clearly incompetent to tax the whole state for such purposes. And the converse doctrine is true that there may be a public purpose which would serve as a basis for state taxation, but would not uphold a taxation which municipal corporations might lawfully vote and collect. And again, a tax can not be imposed exclusively upon any subdivision of the state to pay an indebtedness or claim which is not peculiarly the debt of such subdivision, or to raise money for any purpose not peculiarly for the benefit of such subdivision. In other words, if the tax be laid upon one of the municipal subdivisions of the state alone, the purpose must not only be public, as regards the people of that municipality, but also local.[1]

But what is for the public good, and what are public purposes, and what does constitute a public burden, are questions which the legislature must usually decide upon its judgment, and in respect to which it is vested with a large discretion, which can not be controlled by the courts, except, perhaps, where the action is clearly evasive, or where, under a pretense of a lawful authority, it has assumed to exercise one that is unlawful.[2]

[1] Sanborn *v.* Commissioners, 9 Minn. 273.

[2] Cooley on Const. Lim., 488.

§ 131. **The rule in Iowa.**—The supreme court of Iowa has held that while the authority to determine what is or is not a public purpose is in the legislative department, yet this power is not without limit, and the courts, when appealed to, may rightfully determine whether, in a particular case, the burden imposed is for a public or private purpose.[1]

§ 132. **The rule in Kansas.**—The supreme court of Kansas has held the correct doctrine to be as to what is such a public benefit that it may be aided by the public is not so much an abstract principle of law as a question of public policy and of political economy which must almost exclusively be determined by the legislature. And when the legislature has determined the question, when it has determined that a certain thing is of such great public benefit that it is public policy to aid it by taxation, if the courts may still say that such is not public policy, and for that reason declare the act of the legislature unconstitutional, the courts must possess almost despotic power. If such is correct doctrine, then there is an appeal from the legislature to the courts on mere questions of policy.[2]

§ 133. **The rule in New Hampshire.**—The supreme court of New Hampshire has declared that the rule by which to determine whether a purpose is public or private, that is, whether it is one for which the legislature may properly authorize the levying of taxes, is determined not so much by the law as by a general consideration of public policy and political economy.[3]

§ 134. **Examples of public purposes.**—Among the many and varied purposes for which money is usually raised by taxation, there are some which are unquestionably public in every proper sense of the term. And there are others in regard to which it is not always clear whether they are so far public as to constitute a legitimate basis for taxation. In the following instances the courts have declared that the purposes for which

[1] Hanson *v.* Vernon, 27 Iowa 28.

[2] Leavenworth Co. *v.* Miller, 7 Kan. 479.

[3] Perry *v.* Keene, 56 N. H. 514.

taxes were laid or the bonds issued were public and within the proper scope of governmental functions: The preservation of the public peace and good order of the community; provision for the due and efficient administration of justice, the enforcement of civil rights, and the punishment of crimes; provision for the compensation of public officers, for erecting, maintaining, repairing and protecting public buildings and public property in general; for public schools and colleges; for the construction of streets and sewers; for water-works, market-houses and public bridges in cities; for providing fire engines, cemeteries and parks in cities and towns; for the construction of drains and levees to improve lands for cultivation; paying the expenses of legislation and of administering the laws; public charities, the care of the indigent sick, blind or insane, and the maintenance of public asylums, hospitals and work-houses; the construction, repair and improvement of public roads, including highways, turnpikes and paved streets in cities; the enforcement of sanitary regulations designed to promote and protect the public health. These subjects are clearly within the rule of public purposes and constitute a legitimate basis for taxation.[1]

Having considered the question of the power, purposes and limitations upon the power of taxation, we shall now proceed to consider the purposes for which bonds may be issued.

[1] Supervisor, etc., of Hencely Tp. *v.* People, 84 Ill. 544; Merrick *v.* Inhabitants of Amherst, 12 Allen 500; Marks *v.* Purdue University, 37 Ind. 155; Hammett *v.* Philadelphia, 65 Pa. St. 146; People *v.* Brooklyn, 4 N. Y. 420; Rogers *v.* Burlington, 3 Wall. 654; Mills *v.* Gleason, 11 Wis. 470; County Comrs. *v.* Chandler, 96 U. S. 205; Township of Burlington *v.* Beasely, 94 U. S. 310; Board of Park Comrs. *v.* Detroit, 28 Mich. 228; State *v.* Madison, 7 Wis. 688; Booth *v.* Town of Woodbury, 32 Conn. 118; Moulton *v.* Raymond, 60 Me. 121; Brodhead *v.* City of Milwaukee, 19 Wis. 624; Hazen *v.* Essex Co., 12 Cush. 475; Great Falls Mnfg. Co. *v.* Fernald, 47 N. H. 444; Wells *v.* Mayor, etc., of Atlanta, 43 Ga. 67; Mayor, etc., of Rome *v.* Cabot, 28 Ga. 50; West *v.* Bancroft, 32 Vt. 367; Stetson *v.* Kempton, 13 Mass. 272; Jones *v.* City of Camden, 44 S. Car. 319, 23 S. E. R. 141.

CHAPTER VIII.

PURPOSES FOR WHICH BONDS MAY BE ISSUED.

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General Principles.

§ 135. General legislative power.—A municipal corporation may be compelled to enter into a contract for a public purpose, and when a municipality is justly indebted, as under a contract for the erection of public buildings, the legislature may require it to issue its bonds in payment of such indebtedness.[1] So, it has often been held that the legislature may, without consulting the citizens of the locality, compel them to tax themselves to aid public enterprises.[2]

[1] Comrs. of Jefferson Co. *v.* People, 5 Neb. 127; Carter *v.* Cambridge, etc., Bridge Proprietors, 104 Mass. 236; United States *v.* Baltimore R. R. Co., 17 Wall. 322; City of Philadelphia *v.* Field, 58 Pa. St. 320.

[2] 2 Elliott on R. R., § 824; Martin *v.* Dix, 52 Miss. 53; Marks *v.* Purdue

§ 136. **Limitations upon the legislative power.**—The legislature can not authorize the issue of bonds by a municipal corporation for every purpose. As the payment of municipal bonds must ultimately be accomplished by taxation, a valid bond, issued for a purpose for which the legislature could not constitutionally authorize the levy of a valid tax, would be a legal solecism. The question, therefore, generally resolves itself into an inquiry as to the power of taxation, the limitations upon the power to tax, and the purposes for which taxation may be considered. The legislature may, in the absence of a constitutional prohibition, authorize and empower municipal corporations to aid in the construction of work of a public character, in which such corporations have a special interest, and for such purposes to impose taxes upon the citizens.[1]

So it has been held that the legislature may impose a tax and direct the payment of a claim against a municipal or public corporation although the power would not recognize it as a legal obligation.[2]

But a municipality can not, against its will, be compelled to contract a debt for a private purpose, and a mandatory statute requiring it to issue its bonds without its consent, and to invest the proceeds thereof in, or exchange the same for, the stock of a strictly private corporation is declared by the courts to be absolutely void.[3]

University, 37 Ind. 155; United States *v.* Memphis, 97 U. S. 284; County of Livingston *v.* Darlington, 101 U. S. 407; Napa Valley R. Co. *v.* Board, etc., of Napa County, 30 Cal. 435. But see Choisser *v.* People, 140 Ill. 21.

[1] Walker *v.* City of Cincinnati, 21 Ohio St. 14, 8 Am. R. 24; Butler *v.* Dunham, 27 Ill. 473; State *v.* Cornell, — Neb. —, 39 L. R. A. 513.

[2] Town of Guilford *v.* Board, etc., Shenango Co., 13 N. Y. 142; United States *v.* Baltimore R. R. Co., 17 Wall. 322; New Orleans *v.* Clark, 95 U. S. 644; Brewster *v.* Syracuse, 19 N. Y. 116.

[3] People *v.* Mayor of Chicago, 51 Ill. 17; Horton *v.* Town of Thompson, 71 N. Y. 513; Weismer *v.* Village of Douglass, 64 N. Y. 91, 21 Am. R. 586; Chicago, etc., R. R. Co. *v.* Aurora, 99 Ill. 205; Marshall *v.* Silliman, 61 Ill. 218; Wiley *v.* Silliman, 62 Ill. 170; Danielly *v.* Cabiniss, 52 Ga. 211; Pompton *v.* Cooper Union, 101 U. S. 196; People, *ex rel.* Board of Park Comrs. *v.* Detroit, 28 Mich. 228; City of Detroit *v.* Detroit, etc., Plank R. Co., 43 Mich. 140; Thompson *v.* Park Comrs., 44 Mich. 602. Nor, as a general rule, at least, can a tax even be authorized by the legislature and imposed by the municipality for a strictly private purpose. This doctrine is recognized and stated in many of the authorities above cited and also in the

§ 137. **Compulsory obligations must be for a public purpose.** —The legislature has no power, as a general rule, against the will of a municipal corporation to compel it to contract debt for local purposes in which the state has no concern, or to assume obligations not within the ordinary functions of municipal government. Such matters are to be disposed of in view of the interest of the corporators, exclusively, and they have in general the same right to determine them for themselves which the associates in private corporations have to determine for themselves the questions which arise for their corporate action.[1]

The state, in such cases, may remove restrictions and permit action, but it can not compel it.[2]

It is within the province of legislation to provide for enforcing the performance of contracts when made; but to enforce the making of them by individuals is entirely beyond it. Municipal corporations may be compelled to enter into contracts for an exclusive public purpose; but they can not be where the purpose is strictly private.[3]

Municipal Aid Bonds.

§ 138. **Bonds in aid of railroads.**—The building of numerous and extensive lines of railroad in our country within a time comparatively recent, followed by the prevailing desire to give such enterprises all the aid possible, under the expectation of a resulting individual and general benefit, has given rise to legislation conferring upon townships, counties, cities, and other municipal and public corporations, the most noted extraordinary power of authorizing them to subscribe stock in aid of railroads, or make donations for the construction of railroads, running near, to, or through such municipalities and to issue negotiable bonds therefor, and to raise money by resorting to the power of taxation to ultimately pay the same. The exercise of this great power by the legislature of the various states of the Union and the constitutional validity of such leg-

authorities cited in the following sections. See, also, 1 Dillon Munic. Corp., § 508; Cooley Tax. 55, 103.

[1] Cooley on Const. Lim., 230.

[2] People *v.* Batchellor, 53 N. Y. 128.

[3] People *v.* Flagg, 46 N. Y. 401; Atkins *v.* Town of Randolph, 31 Vt. 226.

islation in the exercise of the power of taxation, for such purposes, has been vigorously contested, but it must be admitted that by an almost unbroken current of authorities the competency of such legislation has been sustained in the absence of special constitutional restrictions. And, therefore, the legislature may authorize such subscriptions by municipalities to aid railway companies in subscribing to the stock of such companies, or to make donations to them and provide for the payment of such subscriptions, or donations, by the issue and sale of negotiable bonds of the municipality.[1]

§ 139. **Express power required to issue municipal aid bonds.**—Making donations to railway companies, and issuing interest-bearing bonds in payment thereof, are not among the usual or implied powers possessed by a municipal corporation, and without express power given by statute to issue such bonds, they will be void in the hands of any and all persons.[2] Upon this point there is substantially no diversity of opinion.[3]

§ 140. **Municipal bonds issued without lawful authority are void.**—It is the settled doctrine of the Illinois courts that municipal bonds issued for stock in railroad corporations without authority of law are void, no matter into whose hands they may come, and the collection of taxes levied to pay the interest on the same may be enjoined.[4]

The same court holds that the legislature has not the constitutional power to create a corporate indebtedness of a county or city in favor of a railway company by declaring that an illegal vote to subscribe to the capital stock of such railway company is valid. It is not within the power of the legislature to compel a municipal corporation, without its own consent legally expressed, to enter into or assume obligations to others.[5]

[1] 2 Elliott R. R., §§ 814, 826, and cases there cited in the notes.

[2] Welch *v.* Post, 99 Ill. 471.

[3] 2 Elliott R. R., §§ 827, 875, and authorities there cited.

[4] The People *v.* Hamill, 134 Ill. 666; Barnes *v.* Town of Lacon, 84 Ill. 461; Lippincott *v.* Town of Pana, 92 Ill. 24; Pitzman *v.* Village of Freeburg, 92 Ill. 111; Gaddis *v.* Richland Co., 92 Ill. 119; Town of Middleport *v.* Ætna Life Insurance Co., 82 Ill. 562; Marshall *v.* Silliman, 61 Ill. 218.

[5] Choisser *v.* The People, 140 Ill. 21.

§ 141. **Power to issue municipal aid bonds must be strictly pursued.**—The rule is well settled that there is no inherent power in municipal corporations to aid in the construction of railroads, either by becoming subscribers to the capital stock of the railroad company, or by making donations to such company of money or bonds, but such power can be given only by express legislative provision, and the authority, when conferred, must be strictly pursued.[1]

Where bonds are void for having been donated to a railway company in lieu of authorized subscription to capital stock, a tax levied by the county to pay interest on such bonds, in the absence of proof of their passing into the hands of innocent *bona fide* purchasers, is illegal and it will be error for the county court to enter judgment against an objector's lands for such tax.[2]

§ 142. **Power to issue railway aid bonds, when discretionary.**—An act of the legislature of the state of Wisconsin provided that the board of supervisors of a certain county "shall have power, by resolution, to cause to be issued bonds to an amount of not exceeding fifty thousand dollars 'if a majority of the ballots cast' by the legal voters in said county be for railroad aid." It was held where a majority of the ballots cast were "for railroad aid" that it still rested in the discretion of the board of supervisors whether such bonds should be issued.[3]

§ 143. **Power and authority of county commissioners to subscribe to the stock of a consolidated railway company.**—Where, after an election had been held in a county which resulted in

[1] Choisser *v.* The People, 140 Ill. 21; Harding *v.* Rockford, etc., Railroad Co., 65 Ill. 90; Macoupin Co. *v.* The People, 58 Ill. 191; Board of Supervisors *v.* Farwell, 25 Ill. 163; Clark *v.* Hancock Co., 27 Ill. 305; Supervisors of Marshall Co. *v.* Cook, 38 Ill. 44; Wiley *v.* Silliman, 62 Ill. 170; Gaddis *v.* Richland Co., 92 Ill. 119; Hewitt *v.* Normal School District, 94 Ill. 528; Schaeffer *v.* Bonham, 95 Ill. 368; Lewis *v.* Pima County, 155 U. S. 84, 15 Sup. Ct. R. 22; 2 Elliott R. R., § 831.

[2] Sampson *v.* The People, 140 Ill. 466.

[3] Wadsworth *v.* St. Croix Co., 4 Fed. R. 378; Aspinwall *v.* Daviess Co., 22 How. 364; Town of Concord *v.* Savings Bank, 92 U. S. 625. See, also, Land Grant Railway, etc., Co. *v.* Davis Co., 6 Kan. 256; State *v.* Town of Roscoe, 25 Minn. 445; People *v.* Fort Edward, 70 N. Y. 28.

authorizing the commissioners to subscribe to the stock of a railroad corporation, and before such subscription had actually been made, such corporation, in pursuance of authority granted by general law in force at the time of the election, consolidated with another railroad corporation, it was held, that the authority to make any subscription was terminated, and that an attempted subscription by the commissioners to the stock of a new and consolidated corporation was *ultra vires*, and hence did not bind the county.[1]

§ 144. **Contract to subscribe for railway aid bonds.**—A county, by voting to subscribe for stock in a railway company and to issue bonds in payment therefor without more, does not thereby create a contract between the county and the railway company for that purpose. And it makes no difference that the vote of the county is to subscribe for the stock and to issue the bonds upon certain conditions, which conditions the railway company afterwards performs.[2]

§ 145. **As to the effect of tendering stock by the railroad company to a municipality.**—Where stock has not been subscribed for and no express contract is made by the county to subscribe therefor, the county is not bound to issue the bonds upon tender of the stock by the railway company to the county.[3]

§ 146. **Bonds void when donated in lieu of authorized subscription to capital stock.**—Where a subscription by a county

[1] State etc., *v.* Comrs. of Nemaha Co., 10 Kan. 569; McMahan *v.* Morrison, 16 Ind. 172; Clearwater *v.* Meredith, 1 Wall. 25; L. G. Ry. & Trust Co. *v.* Davis Co., 6 Kan. 256; Supervisors of Fulton Co. *v.* Railroad Co., 21 Ill. 337; Middlesex Turnpike Corporation *v.* Swan, 10 Mass. 384; Buffalo, etc., Railroad Co. *v.* Pottle, 23 Barb. 21; Hartford, etc., Railroad Co. *v.* Croswell, 5 Hill 383; Schenectady, etc., Railroad Co. *v.* Thatcher, 11 N. Y. 102; Marsh *v.* Fulton Co., 10 Wall. 676; Carlisle *v.* Terre Haute, etc., Railroad Co., 6 Ind. 316; Bell *v.* Railway Co., 4 Wall. 598. But see, as to the rule when the subscription has already been made, 2 Elliott R. R., § 886.

[2] Land Grant Railway Co. *v.* Davis Co., 6 Kan. 256; State *v.* Barker, 4 Kan. 379, 22 How. 265; Covington, etc., R. R. Co. *v.* Kenton Co. Ct., 12 B. Monroe 144; People, etc., *v.* Co. of Tazewell, etc., 22 Ill. 147; Macedon, etc., Co. *v.* Snediker, 18 Barb. 317; Utica, etc., R. R. Co. *v.* Brinckerhoff, 21 Wend. 139; 2 Elliott R. R., § 861.

[3] Land Grant, etc., Railway Co. *v.* Davis Co., 6 Kan. 256.

of one hundred thousand dollars to the capital stock of a railway company is authorized by a vote of the people, if the company enters into a contract with the county board by which the latter sells its stock to the company for thirty thousand dollars of its bonds, and issues only seventy thousand dollars of its bonds, this will amount to a donation by the county of seventy thousand dollars of its bonds to the railway company and such bonds as between the county and railway company will be void.[1]

Under the act of February 26, 1876, of the Kansas legislature, the township of Center, in Woodson county, voted to take stock in the St. Louis, Fort Scott and Wichita Railroad to the amount of twenty-seven thousand dollars and to issue bonds of the township in payment therefor. The amount thus voted was $614.45 in excess of the amount of bonds which the township might legally issue. It was held that this vote was not a nullity except as to the sum of $614.45, and that the commissioners could not be restrained from issuing the remainder of the bonds. It was further held that where the proposition submited to the vote of the people provided for the issuing of bonds in the amount of five hundred dollars each, that the fact that the amount which could be legally issued could not be divided exactly into sums of five hundred dollars did not render the vote a nullity, or prevent the county commissioners from issuing the bonds.[2]

§ 147. **The doctrine of municipal aid to railroads in the various state courts.**—It is now the settled doctrine in nearly every state in the American Union that railways are of such a public character that in the absence of constitutional restrictions, municipalities may be authorized by the legislature to grant aid in building railroads, either by subscription to their stock or by donation, and in the exercise of such power, the municipalities may issue negotiable bonds for such donations or subscriptions. The constitutional validity of such

[1] Sampson *v.* The People, 140 Ill. 466.

[2] Turner *v.* Board, etc., of Woodson Co., 27 Kan. 314; Marcy *v.* Township of Oswego, 92 U. S. 637; Hurt *v.* Hamilton, 25 Kan. 76; Cooley Const. Lim., 177.

legislation has been denied by the supreme court of Iowa, Wisconsin and Michigan, and on account of the great constitutional principles involved in these cases and as the opinions were delivered by three of the most eminent judges in this country we shall consider those cases more fully hereafter.

The subject of aid voted to railroads by municipalities has been brought to the attention of the courts in almost every state in the Union. It has been thoroughly discussed and considered in all its varied stages, in those courts. It is true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the states, unless restricted by some special provision of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations; also, to levy the necessary taxes on the inhabitants, and on the property within their limits subject to general taxation, to enable them to pay the debt thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the powers altogether. In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of a railroad was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court held debts created in aid of railway companies by municipalities valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right or duty of the state government to assist by money raised from the people by taxation. The argument in opposition to this power has been, that railroads built by a corporation, organized mainly for purposes of gain, the roads which they built being under their control and not that of the state, were private and not public roads, and the tax assessed on the people went to swell the profit of individuals and not to the

good of the state or to the benefit of the public, except in a remote or collateral way. On the other hand, it was held that roads, canals, bridges, navigable streams and all other highways had in all times been matter of public concern; that such channels of travel and of carrying business had always been established, improved, regulated by the state, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation. We are not prepared to say that the latter view of it is not the proper one, especially as there are other characteristics of a public nature conferred upon these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts and which were predicted when it was first established there can be no doubt. We refer here to this history of the contest over aid to railroads by taxation and shall more fully discuss the subject in this chapter, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the state legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in the aid of private or personal objects, the law authorizing it was beyond the legislative power and was an unauthorized invasion of private rights.[1]

§ 148. **The doctrine of municipal aid to railroads in Kansas.** —The question whether the legislature possesses the power to authorize municipalities to grant aid to railroad companies by subscribing for stock therein, and issuing bonds in payment therefor, when it comes to the courts is purely a legal question, and the courts have nothing to do with the wisdom or

[1] Sharpless *v.* Mayor of Philadelphia, 21 Pa. St. 147; Comrs. of Leavenworth Co. *v.* Miller, 7 Kan. 479; Hanson *v.* Vernon, 27 Iowa 28; People *v.* Salem, 20 Mich. 452; People, *ex rel.* Bay City *v.* State Treasurer, 23 Mich. 499; Whiting *v.* Sheboygan, etc., R. R. Co., 25 Wis. 188; Allen *v.* Inhabitants of Jay, 60 Me. 124; Lowell *v.* Boston, 111 Mass. 454; Jenkins *v.* Andover, 103 Mass. 94.

policy of such legislation. The legislature have no inherent power, but all their power is derived from the people through the constitution of the state. The people, in the primary capacity, possess all the political power of the state, and may themselves authorize municipalities to grant aid to railroad companies; or they may, if they choose, delegate this power to the legislature, and allow the legislature to grant such authority to the various cities and counties. There is no express provision in the constitution of Kansas which prohibits the legislature from authorizing cities, towns and counties to become stockholders in the railroad companies, and issue their bonds in payment for such stock. The act passed by the legislature of the state of Kansas in 1865 authorizing cities, towns and counties to subscribe for the stock to aid railroad companies, and issue their bonds in payment for such stock, is, therefore, constitutional and valid. But such power of the legislature to pass an act granting municipal aid to railroad companies must be found in the general grant of legislative power under the constitution of the state, which provides that the legislative power of the state shall be vested in the legislature.[1]

§ 149. **The term "legislative power" construed.**—At the time the constitution of Kansas was framed, the term "legislative power" had a definite and precise signification with reference to this question, established by legislative, executive and judicial construction, practice and usage, and the general understanding of the people throughout the United States, which general understanding and signification was, that said power included the power to authorize municipal aid to railroad corporations; and, therefore, in the absence of anything to the contrary, it must be presumed that the people of this state, when they framed the constitution, used said term with the signification generally given to it, and, therefore, that they intended to give to the legislature the power to pass acts authorizing municipal aid to railroad companies. And if it was the intention of the people that the constitution should give to the legislature the

[1] Comrs. of Leavenworth Co. *v.* Miller, 7 Kan. 479.

power to pass acts authorizing municipal aid to railroads, that instrument must be so construed by the courts; and the courts have no power to amend it or change any of its provisions, or insert any new provisions in it, through the means of judicial construction or interpretation.[1]

§ 150. **The duty of the government to provide suitable facilities for travel and commerce.**—It is a duty incumbent upon all governments to provide suitable and sufficient facilities for the travel and commerce of the country. Canals, roads, bridges, and other artificial means of passage and transportation from one part of the country to another, have been made by the sovereign power and at the public expense, in every civilized state of ancient and modern times. In many parts of the civilized world, and particularly on the continent of Europe the railroads of the country are constructed, owned, and operated by the government. Many of the states of this Union have constructed, owned, and operated both railroads and canals, and their right to do so, so far as we are informed, has never been questioned. Some of the states are doing this very thing to-day, without the least suspicion that they are transcending the legitimate bounds of governmental jurisdiction. It must, therefore, be admitted that in the absence of constitutional restrictions a state might construct, own and operate, all the railroads within the boundaries of the state. It must also be admitted that whatever the state may do in providing artificial means for travel and transportation, it may do through the agency of subordinate public corporations, such as counties, cities towns and villages, which may be locally benefited by such improvement. It will also be admitted that the state may construct railroads through the agency of private corporations or of private individuals. Now, if the construction of a railroad is a public duty which the state may either cause to be done entirely through the agency of public corporations, at the public expense, or entirely through the agency of private corporations or of private individuals, it seems to follow as a logi-

[1] Comrs. of Leavenworth Co. *v.* Miller, 7 Kan. 479; Millard *v.* Lawrence, 16 How. (U. S.) 251.

cal consequence that such a work may be done partly through the agency of public corporations and partly through the agency of a private corporation or private individuals. If private enterprise will take hold of such public improvements and construct them, all experience has shown it is better to let private enterprise do it. But if private enterprise will only perform a part, is it not better to let private enterprise perform that part and the public perform the other part, than that the public shall be deprived of all the benefits of such necessary and valuable improvements?[1] In other words, the whole question resolves itself into an inquiry as to the ultimate object, use or purpose intended by the government in granting the aid to railroad companies, whether that object, use, or purpose is public or private, and not upon the nature or character of the means used in effecting or accomplishing that object. It is the ultimate end, object and purpose that must determine the power of the legislature to act in the premises, and not the nature or character of the corporation or person through whose intermediate agency this end, object or purpose is expected to be accomplished.

§ 151. **A railroad is a public purpose.**—A railroad is a public purpose because it increases the facility for travel and transportation from one part of the country to another. In this respect it is a great and inestimable public benefit. And yet there are other public benefits incidentally springing from the construction and operation of railroads. The increased value of all property within their vicinity is one; but this is probably only a measure of the value of the increased facility for travel and transportation. The increase of the public revenue is another, and this, or rather the decrease of the public burdens, can not well be overestimated. But the increased facility for travel and transportation is the main object in the creation of railroads, and this it is which constitutes a railroad a public purpose. All other benefits, though belonging of right to the public, are simply incidental.

It is undoubtedly true that railroad companies, in contradis-

[1] Leavenworth Co. *v.* Miller, 7 Kan. 479.

tinction to municipal corporations, are always classed as private corporations; but to class them with other private corporations is a great mistake. They differ essentially from all other private corporations in many respects, and in reference to them ought to be classed as public. The sovereign power of eminent domain which is always conferred upon railroad companies has never been and could not be conferred upon a strictly private corporation. And the government exercises a control over railroad companies in compelling them to carry passengers and freight, and in regulating the prices of the same to an extent never exercised over strictly private corporations or private persons. We have the combined authority of every legislature, of every executive, and of every court in the United States, that the construction and operation of a railroad, even in the hands of a private corporation is a public purpose; for if it were otherwise every lawyer in the land knows that the sovereign power of eminent domain could not be exercised in its favor. This ought to be conclusive of the question; but it is said it is not such a public purpose as will support taxation. Strange, indeed! The power of eminent domain is limited in its scope and operation to but few subjects. At every step it is traversed and opposed. Everywhere the plea of inexorable necessity must be interposed in its favor or its progress is ended. Not so with taxation. As we have already seen, taxation is the most universal, broad, sweeping and unlimited power possessed by governments. It is the power to destroy, and has no limit except in the will of the sovereign.[1]

No instance has been shown nor can any be shown where the government may aid a thing by the power of eminent domain, where it can not also aid it by the power of taxation. No instance has been shown or can be shown where the government may aid a thing by the exercise of any of its sovereign powers, where it may not also aid it by taxation.[2]

§ 152. **Rule for determining extent of municipal aid.**—It is also claimed that the taxes must be duly apportioned, and the

[1] McCulloch *v.* Maryland, 4 Wheat. 316.

[2] Leavenworth Co. *v.* Miller, 7 Kan. 479.

district taxed must have a special interest in, and be specially benefited by, the thing for which the tax is levied. This is admitted; but still the government has a very broad and extensive discretion in the matter. The most that the legislature can do is to adopt the best rules within their power for the apportionment of taxes. And these rules, however good, will sometimes be found to work injustice and hardship. No system has ever yet been devised, and the wisdom of man will probably never be able to devise a system of apportionment that will do exact justice to every individual and to every locality. In cases of local improvement or improvements that confer local benefits, the best system for securing the right of the locality to be taxed that has yet been tried, is to let the locality itself say how much the benefit is worth, and therefore how much it is willing to be taxed for it. Under such a rule the locality taxed can certainly have no right to complain. To illustrate, in cities where street improvements are made, a street anywhere in the city is considered of such a public benefit to the whole city that the whole city may be taxed for any improvements made thereon. And it is also considered of such a special and local benefit to each individual owning property adjacent thereto, that he may be taxed with the entire cost of improvement made in front of his own property.[1]

A railroad built anywhere in the state is a public benefit to the whole state, and upon the same principle as taxation for street improvements, in the absence of any constitutional restrictions, the whole state could be taxed for its construction; and as each locality is also specially benefited by the improvement, there seems to be no good reason why it, instead of the state, should not be taxed to the extent of that benefit. Such has been the practice in nearly all the states of this Union. On the continent of Europe, where railroads are generally constructed and owned by the government, we understand that both systems of taxation are considered legal. The whole state

[1] Hines *v.* City of Leavenworth, 3 Mills, 6 Kan. 288; Hoyt *v.* City of Kan. 186; City of Leavenworth *v.* East Saginaw, 19 Mich. 39.

may be taxed to build a road, or the localities through which it is located may be taxed to build it.[1]

§ 153. **The doctrine in Pennsylvania—Sharpless v. Mayor of Philadelphia.**—On the 6th day of May, 1852, an act was passed by the legislature of Pennsylvania, authorizing the corporate authorities of the city of Philadelphia, to subscribe for shares in the stock of the Philadelphia, Eastern and Watergap Railroad Company, and to raise the money necessary to pay for such stock by a loan on the credit of the city. On the 9th of April, 1853, a similar act was passed for similar subscription to the stock of the Hempfield Railroad Company. In pursuance of these acts the common council authorized the mayor, as the executive magistrate of the city, to subscribe for ten thousand shares in the Hempfield Company forthwith and for the same number in the Watergap Company upon certain conditions. A bill in equity for an injunction was filed in the supreme court by Sharpless to enjoin the mayor and common council from making the subscription in aid of the railroad company, in pursuance of the acts of the legislature and the ordinances of the city. The bill in equity complained that the subscription would add another million dollars to the already heavy debt of the city, impair the public credit thereof and greatly augment the taxes of the people. None of the facts were disputed. No question of construction was raised as to the act of the assembly or the ordinances. No contention was raised that anything had been done, or was likely to be done by the authorities of the city, except what the legislature meant to authorize. But the plaintiff asserted that the laws were unconstitutional and void. Whether the legislature could pass a valid act giving to a municipal corporation the power to subscribe for stock in aid of a railroad company was the sole question to be determined by the supreme court. The opinion was delivered by Chief Justice Black, one of the greatest jurists of this country, who declared that "this was, beyond all comparison, the most important

[1] Comrs. of Leavenworth Co. *v.* Miller, 7 Kan. 479.

cause that had ever been in this court since the formation of the government." The only substantial wrong complained of in the bill was that a public debt was about to be created for a purpose which the plaintiffs were unwilling to join in promoting, and that the debt made, and most probably will involve, the necessity of a tax, of which they must pay their share. But if it be imposed in pursuance of law, passed by the supreme legislative authority of the state, and not in conflict with the constitution, it must be borne. The learned court declared: "That the taxing power, being a legislative duty, it is, of course, entrusted to the general assembly, and it is given to them without any restriction whatever. They are to use it according to their discretion, and if they abuse it, and if public opinion is not just or enlightened enough to correct their errors, there is no remedy. But I do not mean to assert that every act which the legislature may choose to call a tax law is constitutional. The whole of a public burden can not be thrown upon a single individual, under pretext of taxing him, nor can one county be taxed to pay the debts of another, nor one portion of the state to pay the debts of the whole state. These things are not excepted from the powers of the legislature, because they did not pass to the assembly the general grant of legislative power. A prohibition was not necessary. An act of an assembly commanding or authorizing them to be done would not be a law, but an attempt to pronounce a judicial sentence, order, or decree."[1]

§ 154. **A railroad is a public highway for the public benefit.** —A railroad is a public highway for the public benefit, and the right of a corporation to exact a uniform, reasonable stipulated toll from those who pass over it does not make its main use a private one. The public have an interest in such a road when it belongs to a corporation as clearly as they would have if it were free; or as if the tolls were payable to the state, because travel and transportation are cheapened by it to a degree

[1] Sharpless *v.* Mayor of Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; McCulloch *v.* Maryland, 4 Wheat. 316; Cheaney *v.* Hooser, 9 B. Mon. 330.

far exceeding all the tolls and charges of every kind, and this advantage the public has over and above those of rapidity, comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth. It is a grave error to suppose that the duty of a state stops with the establishment of these institutions which are necessary to the existence of the government; such as those of the administration of justice, the preservation of peace, and the protection of the country from foreign enemies. Schools, colleges and institutions for the promotion of the arts and sciences, which are not absolutely necessary, but highly useful, are also entitled to a public patronage enforced by law. To aid, encourage and stimulate commerce, domestic and foreign, is a duty of the sovereign as plain and as universally recognized as any other. It is on this principle that the mint and post-office are in the hands of the government; for they are but aids to commerce. For the same reason we maintain a navy to keep open the highway of nations. It was the commercial restriction which caused the Revolution, and injuries to our trade which produced the subsequent war against England, with all the expense of money and blood. Canals, bridges, roads and other artificial means of passage and transportation from one part of the country to another have been made by the sovereign power, and at the public expense, in every civilized state of ancient and modern times. It being the duty of the state to make such public improvement, if she happen to be unable or unwilling to perform it herself to the full extent desired, she may accept the voluntary assistance of an individual, or a number of individuals associated together and incorporated in their company. The company may be private, but the work they are to do is a public duty; and along with the public duty there is delegated a sufficient share of the sovereign power to perform it. The right of eminent domain is always given to such corporations. But the right of eminent domain can not be used for private purposes; and therefore if a railroad, canal, or turnpike, when made by a corporation, is a mere private enterprise, like the building of a tavern, store, mill or blacksmith shop, there never was a constitutional charter given to

an improvement company, and every taking of lands, or materials under any of them is a flagrant trespass. If the making of a railroad is a public duty, which the state may either do entirely at the public expense or cause to be done entirely by a private corporation, it follows that such work may be made partly by the state and partly by the corporation, and that people may be taxed for a share of it as rightfully as for the whole. The corporation may be aided by an exertion of the taxing power as well as with the right of eminent domain. Accordingly we find that from the earliest time the commonwealth has subscribed for the stock of such corporations, and paid over the money to them in pursuance of laws which no one ever doubted to be constitutional.[1]

§ 155. **The doctrine in Michigan—People v. Salem.**—The question whether the legislature had the power to authorize municipalities to grant aid to railroad companies by subscribing for stock and issuing bonds in payment therefor, was considered by the supreme court of Michigan in 1870, in the case of the People *v.* The Township Board of Salem. The court held in this case that the exercise by a municipal corporation of the power to pledge its credit is an incipient step in the exercise of the power of taxation; and unless the object to be promoted be such as may be provided for by taxation, the power to make the pledge does not exist; and the legislature can not confer it. It is essential to a valid exercise of the power of taxation that it be for a public purpose; that it be exercised according to some rule of apportionment throughout the state, if it be a state purpose; or throughout the municipal division interested or to be affected, if it be local. The

[1] Sharpless *v.* Mayor of Philadelphia, *supra*; Harvey *v.* Lloyd, 3 Pa. St. 331; Commonwealth *v.* McWilliams, 11 Pa. St. 61; Moers *v.* City of Reading, 21 Pa. St. 188; Commonwealth *v.* Comrs. of Allegheny Co., 32 Pa. St. 218; Commonwealth *v.* Pittsburg, 41 Pa. St. 278; Commonwealth *v.* Perkins, 43 Pa. St. 400; Erie *v.* Erie Canal Co., 59 Pa. St. 176; Page *v.* Allen, 58 Pa. St. 338; Pittsburg Appeal, 79 Pa. St. 317; Wheeler *v.* Philadelphia, 77 Pa. St. 338; Grim *v.* Weissenberg School District, 57 Pa. St. 433; Hammett *v.* Philadelphia, 65 Pa. St. 142; Erie Railroad Co. *v.* Casey, 26 Pa. St. 287; Speer *v.* School Directors, 50 Pa. St. 157; Pennsylvania R. R. Co. *v.* Philadelphia, 47 Pa. St. 189.

term "public purposes," as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish objects for which, according to settled usage, the government is to provide, from those which, by the like usage are left to private inclination, interest or liberality. A corporation created for the purpose of constructing a railway to be owned and operated by the corporators is a private corporation; and the road when constructed will not be a public highway, except in a very qualified sense as it accommodates the travel and traffic of the public; and it is, therefore, no more a public object than any other private enterprise, which also supplies the public want, or furnishes to the public a convenience. Although an incidental benefit may accrue to the public from a private enterprise, yet that will afford no ground for imposing burdens upon the public by way of taxation in behalf of such enterprise. The fact that the state may exercise the power of eminent domain in behalf of associate parties who propose to accommodate some public need does not determine its right to exercise the power of taxation in behalf of the same parties, in aid of the same object. The principles governing the eminent domain correspond to those controlling the police power, rather than those applying to the power of taxation; and its exercise has regard rather to the public need than the public character of its object. Every necessary industry has the right to exist, and if private interests would otherwise preclude, the eminent domain may be employed to give the opportunity; and on this ground a private corporation proposing to establish a thoroughfare may have compulsory means of obtaining a right of way. But taxation can no more be employed in behalf of such corporation than in behalf of the projectors of a mill, a hotel or any other private enterprise.[1]

The power of the legislature of Michigan to pass laws authorizing the issue of bonds in aid of railroads was before the supreme court of the United States in 1873, in the case of Pine

[1] People *v.* Salem, 20 Mich. 452; People, *ex rel.* Bay City, *v.* State Treasurer, 23 Mich. 499.

Grove Township *v.* Talcott. The same questions were considered in this case as in the case of the People *v.* Salem, and in an able and exhaustive opinion the supreme court of the United States declared that the act of the legislature of Michigan authorizing the issuance of bonds for the aid of railroads was constitutional and valid, thus reversing the doctrine laid down by the supreme court of Michigan.[1]

§ 156. **The Michigan doctrine criticised by the supreme court of the United States.**—The supreme court of the United States, in construing the act of the legislature of Michigan authorizing municipalities to issue bonds in aid of railroads, criticised the doctrine laid down by the supreme court of Michigan in the cases of People *v.* Salem and Bay City *v.* Treasurer, as follows: "We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. Similar laws have been passed in twenty-one states. In all of them but two, it is believed, their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the states where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act, by an implication equivalent in effect to an express declaration. And during the period covered by their enactment neither of the other departments of the government of the state lifted its voice against them. The acquiescence was universal.[2]

"The general understanding of the legal profession throughout the country is believed to have been that they were valid. The national constitution forbids the states to pass local laws

[1] Township of Pine Grove *v.* Talcott, 19 Wall. 666

[2] Gelpcke *v.* City of Dubuque, 1 Wall. 175.

impairing the obligations of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."[1]

§ 157. **The doctrine in Iowa—Hanson v. Vernon.**—The legislature have no constitutional power to authorize the taxation of the people or property of a township, town or city, in order to raise a fund to be given as a gratuity to a railroad company to aid it in the construction of its road through that vicinity. The act of the legislature of 1868, authorizing townships and incorporated towns and cities to aid in the construction of railroads, is not a valid or legitimate exercise of the taxing power; and though the money demanded of the citizens is called a tax, properly speaking it is not such, but, in fact, a coercive contribution in favor of private railway corporations, and violative not only of the general spirit of the constitution as to the sacredness of private property, but that specific provision which declares that no man shall be deprived of his property without due process of law. It is a well-settled principle of American constitutional law, that an act of the legislature may be unconstitutional in two ways: first, because it assumes, or seeks to confer, power not legislative in its nature; second, because it violates some specific provision of the national or state constitution. The act of 1868, providing for the taxation of property by townships, towns and cities, to aid in the construction of railroads, is unconstitutional in both these respects. The legislature has only the power to raise revenue by taxation for public purpose; and when it is raised for a purpose not con-

[1] Butz *v.* City of Muscatine, 8 Wall. 575; Township of Pine Grove *v.* Talcott, 19 Wall. 666; Railroad Co. *v.* County of Otoe, 16 Wall. 667; Olcott *v.* Supervisors, 16 Wall. 678.

nected with the public interest, it is no longer taxation, though so denominated, and the attempt is as clearly unconstitutional as any act could be which is expressly prohibited by the constitution. While the authority to determine what is or is not a public purpose is in the legislative department, yet this power is not without limit, and the courts, when appealed to, may rightfully determine whether, in the particular case, the burden imposed is for a public or private purpose. Railroad companies are private corporations, and their undertakings can no more be aided by taxation than can the undertakings of any other private corporation, or of an individual.[1]

§ 158. **The doctrine in Wisconsin.**—Prior to 1870, it seems to have been as well settled in Wisconsin as elsewhere that the construction of a railway was a matter of public concern, and not the less so because done by private corporations. That the state might itself make such improvements, and impose taxes to defray the cost, or exercise its right of eminent domain therefor, was beyond question. Yet, confessedly it could neither take property or tax for such purpose, unless the use for which the property was taken or the tax collected was a public one. And it was also the undoubted law of the state that building a railroad or a canal by an incorporated company was an act done for the public use, and thus the power of the legislature to delegate to such a company the state's right of eminent domain was justified. The supreme court of that state held that the incorporation of companies for the purpose of constructing a railroad or canals afforded the best illustration of the delegation of powers to exercise the right of eminent domain, by the condemnation and seizure of private property for public use upon making just compensation therefor. It was conceded that the only principle upon which such delegation of power could be justified was that the property taken by those companies was taken for the public use.[2]

Thus it was declared by that court in another case involving this principle that the power of municipal corporations, when

[1] Hanson *v.* Vernon, 27 Iowa 28.

[2] Pratt *v.* Brown, 3 Wis. 603; Robbins *v.* Milwaukee, etc., Railroad Co., 6 Wis. 610.

authorized by the legislature to engage in works of internal improvement, such as the building of railroads, canals, harbors and the like, or to loan their credit in aid thereof, and to defray the expenses of such improvements, and make good their pledges by an exercise of their power of taxing the persons and property of their citizens, has always been sustained on the ground that such works, although they are in general operated and controlled by private corporations, are, nevertheless, by reason of the facilities which they afford for trade, commerce, and intercommunication between the different and distinct portions of the country, indispensable to the public interests and public functions. It was originally supposed that they would add, and subsequent experience demonstrated that they have added, vastly, and almost immeasurably, to the general business, the commercial prosperity, and the pecuniary resources of the inhabitants of cities, towns, villages and rural districts through which they pass and with which they are connected. It is, in view of these results, the public good thus produced, and the benefits thus conferred upon the persons and property of all the individuals composing the community, that courts have been able to pronounce them matters of public concern, for the accomplishment of which the taxing power might lawfully be called into action. It is in this sense that they are said to fall so far within the purposes for which municipal corporations are created, that such corporations may engage in, or pledge their credit for, their construction.[1]

So, where the validity of a law authorizing a local tax to secure the Lake Shore was in question, the court discussed at length the nature of a public use for which taxation was lawful and declared that the use was a public one though only the property of some inhabitants of the city was saved, remarking, that to determine whether a matter is public or merely a private concern, we have not to determine whether or not the interests of some individuals will be directly promoted, but whether those of the whole or the greater part of the community will be.[2]

[1] Hasbrouck *v.* Milwaukee, 13 Wis. 42.

[2] Soens *v.* City of Racine, 10 Wis. 271.

The legislature can not, however, create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It can not, in the form of a tax, take the money of a citizen and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which the money is raised by taxation must be public, and such as would subserve the common interest and well-being of the community required to contribute. To justify the court in arresting the proceedings and declaring the tax void, however, the absence of all possible public interest in the purposes for which the bonds are laid must be clear and palpable; so clear and palpable as to be perceptible to every mind at the first blush.[1]

§ 159. **The doctrine in Whiting v. The Sheboygan Railroad Company.**—The power of the legislature to authorize taxation in aid of railroads has been declared to be unconstitutional and void by the supreme court of Wisconsin in the case of Whiting *v.* The Sheboygan and Fond du Lac Railroad Company, notwithstanding the earlier decisions.

The court held that taxation to aid a railroad owned and operated by private individuals or corporations is unconstitutional, and an act of the legislature authorizing county orders to be issued in aid of a railroad, and taxes to be levied for the payment thereof, on condition that the consent of the majority of the people should be manifested by ballot, and the railroad should be brought to a specified state of completion, is void. Chief Justice Dixon, who delivered the opinion of the court in this case, declared: "It is assumed as the foundation, that that which is a public use so as to justify the exercise of the power of eminent domain is also public use which will, under all circumstances, justify the exercise of the power of taxation. It is assumed that no difference exists in public uses, but that all are alike, and that a public use once established, with respect to one of these powers, is necessarily a public use with respect to the other. And this we think to be the great mis-

[1] Brodhead *v.* City of Milwaukee, 19 10 Wis. 136; Bushnell *v.* Beloit, 10 Wis. 624; Clark *v.* City of Janesville, Wis. 195.

take upon this point. It arises from considering two things alike which are in reality different. It ignores all distinction between different public uses and the effect which such differences may have in determining the legislative authority. That public uses differ very widely from each other is a proposition which no one can deny. They differ in nature and kind, and the degree of the extent of the public enjoyment. There may be various degrees of the same kind of public use. It may be more extensive and complete in one case than in another. Certain uses are, *per se*, public, such as of public highways, public buildings, and the channels of public rivers. Others have been declared public by the decisions of the courts, as of railroads, turnpikes, public ferries, toll bridges, and the like. But these last have as yet been declared public only with respect to the power of eminent domain. * * * We think there exists a difference here, and that it is such that, though the power of eminent domain may be exercised, yet the power of taxation, as here claimed, can not be. And in order to understand this, it will be necessary to precisely ascertain and define the nature and extent of that public use which, in the case of these private railroad companies, has been held sufficient to authorize the exercise of the power of eminent domain in their behalf. And first let us rid the question of some considerations which, for want of proper care and attention, have too often been most erroneously supposed to enter into it. Of such consideration the principal and most important one is, that the public use which justifies the exercise of the power, in some way consists in the general benefit and advantages accruing to the public at large from the creation and operation of these works of internal improvement. It is very clear that the public use does not in any manner consist of these, for if it did, then every enterprise or business prosecuted for private gain or emolument, and by which the public prosperity and welfare is also promoted, would be a public use, and, as such, would justify the exercise of the power of eminent domain in behalf of the persons and corporations so engaged, and according to the doctrine of those who differ from us in opinion, likewise the power of taxation, to donate money and property to

such persons and corporations. There are very many enterprises and occupations of a private character, connected with trade, commerce and manufactures, which are quite as much to our advantage as a people, and quite as necessary and indispensable to our growth and prosperity as a nation, as the building and operating of railroads, and some are even more so. The incidental public benefit or advantages, though in a general sense to be considered, do not, therefore, constitute, in the sense of the law, a public use which will justify the interference of the government.''[1]

The same question was before the supreme court of the United States in 1872, and after an able and exhaustive opinion by Justice Strong, in which he reviews the former decisions of the supreme court of Wisconsin, and also this case, the court sustained the constitutional validity of the act of the legislature of Wisconsin authorizing municipalities to grant aid to railroad companies.[2]

§ 160. **Power to issue railway aid bonds under a special law.** —The legislature of Wisconsin passed an act whereby it authorized the city of Fond du Lac to subscribe to the capital stock of a particular railroad, and to make, issue and deliver to such company its bonds, etc., provided a majority of the legal voters of said city shall first have voted in favor of such subscription, as, also, in favor of a proposition, in writing, stating the amount, kind and description of stock or bonds, etc., to be subscribed and submitted by such railroad. The statutes set no limit to the amount of such subscription, except that the city authorities could make only such subscription and issue such an amount of bonds as called for by this proposition. In an action brought by the holders of coupons attached to the bonds, it was held that such statute was not in conflict with section 3 of article 11 of the constitution of the state, providing for a restriction upon the power of municipalities, among

[1] Whiting *v.* The Sheboygan and Fond du Lac R. R. Co., 25 Wis. 167, 3 Am. Rep. 30; 1 Dillon on Munic. Corp., § 157.

[2] Olcott *v.* Supervisors, 16 Wall. 678. See, also, Northern Pac. R. R. Co. *v.* Roberts, 42 Fed. R. 734, criticising the Whiting case as contrary to the earlier decisions in Wisconsin.

other things, to borrow money, contract debts, and loan their credit.[1]

§ 161. **Power to issue railway bonds under the South Carolina constitution.**—It has been held by the United States circuit court of appeals that the legislature of South Carolina has the power, under the constitution of that state, providing that it may permit municipal corporations to assess and collect taxes for corporate purposes only, to authorize such corporation to issue bonds to aid in the construction of railroads.[2]

§ 162. **Limitations upon the power to issue municipal aid bonds in Ohio.**—It has been held by the United States circuit court of appeals that the law of Ohio of 1880, which authorizes any township having a population of three thousand six hundred and eighty-three to issue bonds in the sum of forty thousand dollars, to construct a line of railway seven miles in length between termini to be determined by the township trustees, in view of the limited amount to be appropriated, and the failure to prescribe location or termini, on its face contemplates, not a constructed and equipped railroad, but a mingling of public aid with private capital, and therefore violates the constitution of that state, which forbids the general assembly to authorize the township to raise money for, or loan its credit to or in aid of, any joint stock company, corporation or association.[3]

§ 163. **The doctrine of municipal aid to railroads in the supreme court of the United States.**—The subject of municipal aid to railroad companies has been before the supreme court of the United States in a number of cases, and the validity of the legislative acts authorizing such legislation has been sustained

[1] Smith *v.* City of Fond du Lac, 8 Fed. R. 289; Foster *v.* City of Kenosha, 12 Wis. 688; Fisk *v.* City of Kenosha, 26 Wis. 23; Long *v.* New London, 5 Fed. R. 559.

[2] Town of Darlington *v.* Atlantic Trust Co., 68 Fed. R. 849.

[3] Ætna Life Ins. Co. *v.* Pleasant Tp., 62 Fed. R. 718; 11 Sup. Ct. 215; 138 U. S. 67 followed; 53 Fed. R. 214 affirmed. But see MacKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. R. 128, holding that a railroad which was both a public and a private enterprise might be aided, as to the former, by a municipal tax.

by the court. The supreme court, in reaching this result, places its judgment upon the broad ground that highways, turnpikes, canals and railways, although owned by individuals under public grants, or by private corporations, are *publici juris;* that they have always been regarded as governmental affairs, and that their establishment and maintenance are recognized as among the most important duties of the state, in order to facilitate transportation and easy communication among its different parts; and hence the state may put forth, in favor of such improvements, both its power of eminent domain (as it constantly does) and its power to tax, unless there be some special restriction in the constitution of the particular state. These powers may, in the judgment of the court, be lawfully exerted, because the use is in its nature a public use; and these works are subject to public control and legislation, notwithstanding they may be exclusively owned by private persons or corporations. It must be admitted that compulsory taxation in favor of railways and like public improvements owned by individuals or companies is an exercise of power going quite to the verge of legislative authority. Although it is a doctrine that must now be considered as judicially settled, still it is one which has encountered a vigorous opposition, both on the ground of expediency and of power; and the exercise of authority, as before noticed, has been so disastrous as already, in several of the states, to have led to constitutional provisions for the protection of the citizens.[1]

§ 164. **The same subject—The Wisconsin statute construed.** —The legislature of Wisconsin in 1867 passed a law authorizing certain municipalities to grant aid in the construction of railroads in that state. The supreme court of that state, in passing upon the validity of the act, as already stated, held that taxation in aid of railroads owned and operated by private individuals or corporations is unconstitutional, and that the act of the legislature of 1867, authorizing bonds to be issued in aid of any railroad, and taxes to be levied for the payment thereof, was unconstitutional and, therefore, void.[2]

[1] Olcott *v.* Supervisors, 16 Wall. (U. S.) 678.

[2] Whiting *v.* The Sheboygan, etc., R. Co., 25 Wis. 167.

The validity of this act was drawn in question before the supreme court of the United States in 1872. In the case of Olcott *v.* Supervisors of Fond du Lac County, the court held that the act of the legislature of the state of Wisconsin, authorizing the issue of bonds in aid of railroads, was constitutional and valid. The opinion of the court was delivered by Justice Strong, who declared, "that railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly, it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for private use. Yet, it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for the public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporation bodies, or even by individuals when they obtain their power to construct it from legislative grant. It would be useless to cite the numerous decisions to this effect which have been made in the state courts. We may, however, refer to two or three which exhibit fully not only the doctrine itself, but the reasons upon which it rests."[1]

Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the state. Though the ownership is private,

[1] Beekman *v.* Railroad Co., 3 Paige Wend. 1; Worcester *v.* Railroad Co., 45; Bloodgood *v.* Railroad Co., 18 4 Metc. 564.

the use is public. So turnpikes, bridges, ferries and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*. The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used.[1]

That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge.[2]

The learned court continuing, said: "It is unnecessary, however, to pursue this branch of the inquiry further, for it is not seriously denied that a railroad, though constructed and owned by a private corporation, is a matter of public concern, and that its uses are so far public that the right of eminent domain of the state may be exerted to facilitate its construction. But it is contended that, though the purpose and the use may be public, sufficiently to justify taking private property, they are not public when the right to impose taxes is asserted. It is argued that there are differences between the power of taxation and the power of taking private property for a public use, and that because of these differences it does not follow that wherever the one power can be exerted the other can. We do not care to inquire whether this is so or not. The question now is, whether, if a railroad, built and owned by a private corporation, is for a public use, because it is a highway, taxes may not be imposed in furtherance of that use. If there be any purpose for which taxation would seem to be legitimate, it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the state to provide and care for them. Taxation for such uses has been immemorially imposed. When, therefore, it is settled that a railroad is a highway for public use, there can be no substantial

[1] Charles River Bridge *v.* Warren Bridge, 7 Pick. 394.

[2] Cooley on Const. Lim., 261.

reason why the power of the state to tax may not be exerted in its behalf. It is said that railroads are not public highways *per se;* that they are only declared such by the decisions of the courts, and that they have been declared public only with the respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such. True, they must be used in a peculiar manner, and under certain restrictions, but they are facilities for passage and transportation afforded to the public, of which the public has a right to avail itself. As well might it be said a turnpike is a highway only because declared such by judicial decision. A railroad built by a state no one claims would be anything else than a public highway, justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation. Yet it is the purposes and uses of a work which determine its character, and if the purpose is one for which the state may properly levy a tax upon its citizens at large, its legislature has the power to apportion and impose the duty, or confer the power of assuming it, upon the municipal divisions of the state.''[1]

The legislature may confer on municipal corporations the power to subscribe for stock in a railroad or other work of public improvement. And hence the legislature had the right to authorize the city of Kenosha to take stock in a railroad, issue bonds to pay for it, and provide for their redemption by the direction of a levy and collection of a tax.[2]

§ 165. **The same subject—Under the Michigan statute.**—In 1869 the legislature of Michigan passed a law authorizing any township, city or village to pledge its aid, by loan or donation, to any railroad company chartered or organized under and by virtue of the laws of the state of Michigan, in the construction of its road. The Kalamazoo and South Haven Railroad Company was duly organized under the laws of Michigan, and had

[1] Olcott *v.* Supervisors, 16 Wall. 678; Cooley on Const. Lim., 252.

[2] Campbell *v.* City of Kenosha, 5 Wall. 194.

for its object the construction of a railroad from Kalamazoo to South Haven in that state. The line of its proposed route passed through the township of Pine Grove. Pursuant to the act of the legislature, as above stated, a meeting of the electors of the township was called to vote upon the proposition whether the township should, in aid of the construction of the road, give to the company its coupon bonds to the amount of twenty-two thousand dollars, bearing interest at the rate of ten per cent. per annum, one-sixth of the principal to be payable at the end of each succeeding year, from March 1, 1870, until the whole amount was paid; the interest to be payable annually from that time. A majority voted for the proposition and the bonds were issued.

Talcott was the holder and owner of a part of the bonds and coupons which were issued. The validity of these bonds was drawn in question before the supreme court of the United States in 1873, and the only question presented in the record was whether the act of the legislature of the state of Michigan, which authorized municipalities to issue bonds in aid of railroads, was constitutional and valid. The court, in an able opinion delivered by Justice Swayne, held that the act of the legislature of March 22, 1869, authorizing any township, city or village to pledge its aid, by loan or donation, to any railroad company organized under and by virtue of the laws of that state, is not in conflict with the constitution of the state, and that it is a maxim in American jurisprudence, that a statute is not to be pronounced void upon the ground that it is in conflict with the constitution of the state, unless the repugnancy to the constitution be clear and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the constitution must be specified and the act admit of no reasonable construction in harmony with its meaning. The judicial function involved in such a result is one of delicacy, and to be exercised always with caution. The act of the legislature authorizing municipal aid to railroads is for a public purpose. Though a rail-

road corporation is private, its work is public, as much so as if it were to be constructed by the state.[1]

§ 166. **Same subject—Under the Iowa statutes.**—The statute of Iowa authorizing municipalities to aid railroad companies has been passed upon by the supreme court of the United States in a number of important cases. It has been held that where the statute clearly implied that cities have authority to subscribe for railroad stock, and to issue their bonds in payment of such subscription, a city of that state possessed the power to issue such bonds.[2]

A city may borrow money to aid in the construction of railroads, where its charter gives the city authority "to borrow money" for any object in its discretion, under the statutes of Iowa.[3]

Municipal corporations are created by the legislature, and they derive all their powers from the source of their creation; and those powers are at all times subject to the control of the legislature. Such powers, also, in the absence of any constitutional regulation forbidding it, may be enlarged or diminished, extended or curtailed, or withdrawn altogether, as the legislature shall determine. Construction and repair of highways or streets for public travel within their limits are among the usual purposes of their creation, and the expenses of accomplishing those objects are among their usual and ordinary burdens. Railways, also, as a matter of usage, founded upon experience, are so far considered by the courts as in the nature of improved highways, and as indispensable to the public interest and the successful pursuit even of local business that a state legislature may authorize the town and counties of the state, through which a railway passes, to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same with a view of aiding those engaged in the construction, or completing such a public improvement; and a

[1] Township of Pine Grove *v.* Talcott, 19 Wall. 666.

[2] Gelpcke *v.* City of Dubuque, 1 Wall. 175.

[3] Meyer *v.* City of Muscatine, 1 Wall. 384. Some of the statements in this case are, perhaps, too comprehensive under the late authorities.

legislative act conferring such authority is not in contravention of any implied limitation of the power of the legislature.[1]

A county, or other municipal corporation, has no inherent right of legislation, and can not subscribe for stock in a public improvement, unless authorized to do so by the legislature. Such a corporation acts wholly under a delegated authority, and can exercise no power which is not in express terms, or by fair implication, conferred upon it. But the legislature of a state, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner that the objects can be attained, either with or without the sanction of the popular vote.[2]

§ 167. **Same subject—Bonds in aid of plank road.**—The supreme court of the United States has held that bonds issued by a city under the Iowa statutes to aid in constructing a plank road, fall within the same principle as those issued granting aid to a railway. Plank roads are as much highways as railroads, and if authorized to be constructed by the legislature, they are public improvements. Money borrowed to aid in the construction of such work by a municipal corporation is borrowed for a public purpose, and if the road leads from, extends to, or passes through the limits of the corporation furnishing the aid, the bonds of the corporation given as the means of raising the money are within the power conferred by that provision.[3]

And where a plank road is authorized by legislature, and is connected with the municipality issuing the bonds, the case falls within the same rule.[4]

§ 168. **The same subject—Under the Nebraska statute.**—In 1872, the statute of Nebraska, authorizing municipal aid to

[1] Rogers *v.* City of Burlington, 3 Wall. 654.

[2] Thomson *v.* Lee Co., 3 Wall. 327.

[3] Mitchell *v.* City of Burlington, 4 Wall. 270.

[4] Larned *v.* City of Burlington, 4 Wall. 275.

railroads, was before the supreme court of the United States for consideration. The court held that the legislature of Nebraska had authority to authorize its municipal divisions to incur indebtedness and to impose taxation in aid of railroad companies and to make a donation of its bonds to a railroad company beyond its limits and outside the state. And that the act of the legislature of 1869, authorizing the county commissioners of Otoe county to issue the bonds of said county to the amount of one hundred and fifty thousand dollars, to the Burlington and Missouri River Railroad, or any other railroad running east from Nebraska City, was not in conflict with the constitution of the state, and, therefore, valid. This act being an unconditional bestowal of authority upon the county commissioners to issue the bonds to the railroad company, they could lawfully issue the bonds without any submission to a vote of the people of the county of the proposition to approve the bonds, or levy a tax, for the payment thereof.[1]

Bonds to the amount of forty thousand dollars were issued by the county of Otoe, in the state, then territory, of Nebraska, to the Council Bluffs and St. Joseph Railroad Company as a donation to that company to aid in the construction of a railroad in Fremont county, Iowa, to secure the said Otoe county an eastern railroad connection. The validity of these bonds was drawn in question in the supreme court of the United States in 1883. The court held that, notwithstanding any defects or irregularities in the voting upon, or issuing said bonds, they were validated by section 8 of the act of the legislature of the state of Nebraska, passed February 15, 1869, which authorized counties, cities and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvements in that state, and to legalize bonds already issued for that purpose. That the legislature of the state, unless restrained by its organic law, has a right to authorize a municipal corporation to issue bonds in aid of a railroad, and to levy a tax to pay the bonds and the interest on

[1] C., B. & Q. R. R. Co. *v.* Otoe Co., 16 Wall. 667.

them, with or without a popular vote, and to cure by retrospective act, irregularities in the exercise of the power conferred.[1]

§ 169. **Subscriptions of stock and donations of money compared.**—It was contended that the act of the legislature of Nebraska of 1869, authorizing the county commissioners of Otoe county to issue bonds of the county to the amount of a hundred and fifty thousand dollars to the Burlington and Missouri River Railway Company was, as a matter of law, a donation of the county bonds, and that even if the legislature had the power to authorize the county to subscribe to the stock of such a corporation it could not constitutionally authorize a donation. The supreme court of the United States, in considering this same subject, held that there is no solid ground of distinction between a subscription to stock and an appropriation of money or credit. Both are for the purpose of aiding in the construction of the road ; both are aimed at the same objects ; securing the same advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the tax-payers of the county, the stock subscribed for may be worthless, and known to be so. That the legislature of the state might have granted aid directly to any railroad company by actual donation of money from its treasury will not be controverted. No one questions that in the absence of some constitutional inhibition the power of a state to appropriate its money, however raised, is limited only by the sense of justice and by the sound discretion of its legislature. If the power to tax be unrestricted, the power to appropriate the taxes is necessarily equally so. Accordingly nothing has been more common in the state and federal government than the appropriation of public money raised by taxation to objects in regard to which no legal liability had existed. State legislatures have made donations for numerous purposes, wherever, in their judgment, the public wellbeing required them, and the right to make such gifts has never been seriously questioned. As has been said, the security against the abuse of power by a legislature in this direction is found in

[1] Otoe Co. *v.* Baldwin, 111 U. S. 1.

the wisdom and sense of propriety of its members, and in their responsibility to their constituents. But if a state can directly levy taxes to make donations to improvement companies, or to other objects which, in the judgment of its legislature, it may be well to aid, it will be found difficult to maintain that it may not confer upon its municipal divisions power to do the same thing. Counties, cities and towns exist only for the convenient administration of the government. Such organizations are instruments of the state, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the state, through them, is doing indirectly what it might do directly It is true the burden of the duty may thus rest upon only a single political division, but the legislature has undoubted power to apportion a public burden among all the tax-payers of a state, or among those of a particular section. In its judgment, those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse, or a hospital. It is not unjust, therefore, that they should alone bear the burden.[1]

§ 170. **The doctrine of municipal aid to railroads in federal courts**—The legislature of a state, in the absence of constitutional prohibition, may authorize municipal corporations to aid in the construction of railroads, and the statute authorizing certain municipalities to aid in such construction is not in conflict with sections of the state constitution forbidding the credit of the state from being loaned to private persons, or to corporations, and forbidding the state from subscribing to the stock of any corporation, or from being interested in any work of internal improvement, and forbidding any person from being deprived of his property without due process of law.[2]

But a municipal corporation has no power to issue commercial securities, coupon bonds payable to bearer, in payment of

[1] C., B. & Q. R. R. Co. *v.* Otoe Co., 16 Wall. 677; Blanding *v.* Burr, 13 Cal. 343; Town of Guilford *v.* Shenango Co., 13 N. Y. 149; Stewart *v.* Supervisors, 30 Iowa 9; Augusta Bank *v.* Augusta, 49 Me. 507; Chicago, etc., Railroad Co. *v.* Smith, 62 Ill. 268.

[2] Taylor *v.* City of Ypsilanti, 11 Fed. R. 925.

subscriptions to the capital stock of a railroad company, unless by legislative authority, either express or necessarily implied.[1]

In the absence of express power, the authorities of a municipal corporation can not incur any binding obligation by borrowing money in the name of the city for the purpose of donating pecuniary aid to a railway company.[2]

The mere fact that a railroad company is a foreign corporation, and that its road terminates at a point in another state, from which it runs a line of boats, to a city issuing its bonds in aid of such road, affords no ground for a constitutional objection to the grant of power by the legislature to such city to subscribe to the stock of the company.[3]

§ 171. **When subscription to railroad stock may be canceled.**—Where the record shows that in September, 1871, a vote was had by which the county board was authorized to subscribe to the capital stock of a railway corporation, and that in September, 1873, two members of the board met without any request or call for a special session, and without any notice to the third member who was present in the county and could have been served with notice, and not at a regular or adjourned session, and where notice of such session was intentionally and fraudulently withheld by said railroad corporation from said third member, and that at such session the two commissioners present passed a resolution directing a subscription to the capital stock of said company, and such subscription was accordingly made, it was held, that such subscription was not a legal and binding contract upon the county, and that it could maintain an action to have it set aside and canceled, and all bonds delivered in pursuance thereof.[4]

[1] Katzenberger *v.* City of Aberdeen, 16 Fed. R. 745.

[2] Scott's Ex'rs *v.* Shreveport, 20 Fed. R. 714.

[3] Moulton *v.* City of Evansville, 25 Fed. R. 382.

[4] Paola, etc., Railway Company *v.* Anderson Co., 16 Kan. 302; People *v.* Batchelor, 22 N. Y. 128; King *v.* Theodorick, 8 East 543; King *v.* Gaborian, 11 East 77; *Ex parte* Rogers, 7 Cowen 526; Downing *v.* Rugar, 21 Wend. 178; Stow *v.* Wyse, 7 Conn. 214; Harding *v.* Vandewater, 40 Cal. 77; Wiggin *v.* Freewill Baptist, 8 Met. (Mass.) 301.

Internal Improvement Bonds.

§ 172. **Internal improvements defined.**—In several of the states, power is given to municipalities to issue bonds to aid works of "internal improvement." And under this general term the question has arisen, What are works of internal improvement? The supreme court of Alabama, in defining the phrase "internal improvement" says: "Where internal improvements under state authority are spoken of, it is universally understood that works within the state, by which the public are supposed to be benefited are intended; such as improvements of highways and channels of travel and commerce."[1]

§ 173. **A bridge across the Platte river in Nebraska a work of internal improvement.**—The legislature of Nebraska passed an act, "That any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement, to an amount to be determined by the county commissioners of such county, or the city council of such city, not exceeding ten per cent. of the assessed valuation of all the property taxable in said county or city, provided the county commissioners or city council shall first submit the question of issuing bonds to a vote of the legal voters of such county or city, in the manner provided by chapter nine of the revised statutes of Nebraska for submitting to the people of the county the question of borrowing money." Under this act, a county and precinct issued bonds to build a bridge across the Platte river, and on an application by a tax-payer to restrain the collection of taxes levied to pay interest on such bonds, the supreme court of Nebraska, construing the above act in the light of the legislation of the state, held that a bridge was a work of internal improvement within the meaning of the statute, and that under the power to aid, the county might itself construct the bridge.[2]

[1] Mayor, etc., of Wetumpka *v.* Winter, 29 Ala. 651.

[2] Union Pacific R. R. Co. *v.* Colfax Co., 4 Neb. 450. See, also, Wilcox *v.* Deer Lodge County, 2 Mont. T. 574.

§ 174. **Toll-bridge a work of internal improvement under Nebraska statute.**—In a case in the supreme court of the United States the question arose as to whether a toll-bridge was a work of internal improvement for which bonds might, under the statute, legally be issued to aid in building, within the meaning of the Nebraska statutes. The court held that all bridges intended and used as thoroughfares for public highways, whether subject to toll or not, were included, and that county bonds which have been issued under a statute authorizing the issue of such bonds, in aid of an internal improvement, are valid when given for the building of their bridge, which is a thoroughfare though tolls are charged thereon by the county. Whether the county has the right to demand tolls over a bridge which is a thoroughfare will not affect the validity of county bonds issued to aid in the construction of the bridge.[1]

§ 175. **Steam grist-mill.**—A steam grist-mill is not a work of "internal improvement," within the meaning of the statutes of Nebraska, authorizing counties to issue bonds to aid in the construction of any work of internal improvement.[2] But bonds issued by the county commissioners of a county in Nebraska, on behalf of a precinct in that county, to aid a company in improving the water power for a river for the purpose of propelling grist-mills, are issued to aid in constructing a work of internal improvement, within the meaning of the statute of that state.[3]

§ 176. **Court-house not a work of internal improvement.**—The building of a county court-house is not a work of internal improvement, within the meaning of the statute and constitution of Nebraska. But where it appeared in an action upon bonds that they had been issued to raise money to build a court-house, and recited that they were issued under the authority of an act provided for the construction of works of internal improvement in that state, it was held that this reference

[1] Dodge County Comrs. *v.* Chandler, 96 U. S. 205. See, also, State *v.* Babcock, 23 Neb. 179.

[2] Osborne *v.* Adams Co., 109 U. S. 1.

[3] Blair *v.* Cuming Co., 111 U. S. 363. See, also, Traver *v.* Board, etc., Merrick County, 14 Neb. 327; Getchell *v.* Benton, 30 Neb. 870, 47 N. W. R. 468.

to a statute, which gave no authority was no ground for declaring the bonds invalid, so long as ample authority was found elsewhere which had been substantially observed.[1]

In Indiana, cities have no authority, either express or implied, to borrow money to defray the expense of litigation involving the removal of a county seat, and the cost of a lot and court-house and jail for the county, made necessary by such removal, and bonds issued for money so borrowed have no such validity in the hands of any holder as to preclude a citizen and tax-payer from enjoining the refunding of such bonds.[2]

§ 177. **Beet sugar manufactory not a work of internal improvement.**—A beet sugar manufactory which does not manufacture sugar from beets for toll, although propelled by water power, is not within legislative control by virtue of any law of the state of Nebraska, and hence is not a work of internal improvement within the meaning of the constitution or statute as declared by the supreme court of that state.[3]

§ 178. **Internal improvement bonds under the Kansas statutes construed.**—In 1872, the legislature of Kansas passed a law authorizing counties and incorporated cities and municipal townships to issue bonds, for the purpose of building bridges, aiding in the construction of railroads, water power, or other works of internal improvement. Pursuant to this statute Burlington township, in Coffee county, on the 3d day of December, 1872, issued eight thousand dollars of township bonds to aid in the construction and completion, and to furnish the motive power of a steam custom grist-mill in said township. The supreme court of the United States, in constructing this statute, held that a mill run by water power is an internal improvement within the meaning of the Kansas statute. A ferry falls

[1] Board, etc., of Dawson Co. *v.* McNamar, 10 Neb. 276; Board, etc., of Knox Co. *v.* Aspinwall, 21 How. 544; Moran *v.* Miami Co., 2 Black 722; Mercer *v.* Hackett, 1 Wall. 83; Supervisors *v.* Schenck, 5 Wall. 772; Meyer *v.* City of Muscatine, 1 Wall. 384; Hamlin *v.* Meadville, 6 Neb. 227; State *v.* Thorne, 9 Neb. 458.

[2] Myers *v.* City of Jeffersonville, 145 Ind. 431.

[3] Getchell *v.* Benton, 30 Neb. 870, 47 N. W. R. 468; Traver *v.* Board, etc., of Merrick Co., 14 Neb. 327; State *v.* Adams Co., 15 Neb. 568.

within the same principle and so does a steam mill. The court declared that it would require great nicety of reasoning to give a definition of the expression "internal improvement," which should include a grist-mill run by water and exclude one operated by steam; or which would show that the means for transportation were more valuable to the people of Kansas than the means for obtaining bread. It would be a poor consolation to the people of a town to give the power of going in and out of the town upon a railroad, while they were refused the means of grinding their own wheat. Railroads, turnpikes, buildings, bridges, ferries, reclaiming swamps and the like, are no doubt improvements, and if such improvements are within the limits of a town or county, they are internal to such town or county. The statute of Kansas upon the subject of grist-mills is based upon the idea and, indeed, upon the declaration that all grist-mills are public institutions. The statute of 1868 provides that: "All water, steam or other mills, whose owners or occupiers grind or offer to grind for toll or pay, are hereby declared public mills." Regulation is then made for the order in which the custom shall be attended to, the liability of the miller, his duty in assisting to load and unload, and that the rates of toll shall be conspicuously posted. And where the statute authorized the town or counties to issue bonds to aid in the building of bridges, in the construction of railroads, water power, "or other works of internal improvements," and where another statute declared all custom grist-mills to be "public mills" and regulated their management, the supreme court of the United States held that bonds issued by a town to aid in the construction and equipment of a steam custom mill owned by an individual were issued for a public purpose, a public use, which it is the right and duty of the state government to assist, and that the bonds were legal.[1]

The supreme court of Kansas has held that a state-house is an internal improvement, as is a county court-house, a jail or penitentiary as much as is a railroad, a canal or a bridge.[2]

[1] Town of Burlington v. Beasley, 94 U. S. 310.

[2] Comrs. of Leavenworth Co. v. Miller, 7 Kan. 479.

§ 179. **The Nebraska and Kansas cases distinguished by the supreme court of the United States.**—The supreme court of the United States in construing the statute of Nebraska, which authorized counties, cities and precincts of organized counties, "to issue bonds to aid in the construction of any railroad or other work of internal improvement," held that a steam grist-mill was not a work of internal improvement within the meaning of the statutes of the state. It was contended that this construction was in conflict with the former decisions of the supreme court in construing the Kansas statute in the case of Burlington *v.* Beasley, in which the supreme court held that a steam grist-mill was a work of internal improvement within the meaning of the Kansas statute. The two cases are, however, clearly distinguishable. The opinion in construing the Nebraska statute was delivered by Justice Harlan who uses the following language: "The case of Burlington *v.* Beasley is not, as supposed by counsel, an authority for a different conclusion. That case arose under a statute of Kansas, which empowered municipal townships in that state to issue bonds, 'for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads, or water power, by donation thereto, or the taking of stock therein, or for other works of internal improvement.'" The bonds there in suit were issued to aid in the construction and completion of, and to furnish the motive power for a steam custom grist-mill. It was held that the statute, reasonably interpreted, embraced a grist-mill operated by steam, as well as one run by water power; that since municipal aid was authorized for "the construction of * * * water power," the phrase "other works of internal improvements," in the Kansas statute, might be fairly construed as embracing works of the same class, and consequently as embracing a steam grist-mill.

The Nebraska case is different. The only work of internal improvement specially described in the Nebraska statute, was that of a railroad, and the court was not justified by anything in the Burlington *v.* Beasley, or the decisions of the courts of Nebraska in holding that a steam or other kind of grist-mill was of the class of internal improvements which municipal

townships in that state were empowered, by the statute in question, to aid by an issue of bonds.[1]

§ 180. **Internal improvement under the New York statute construed.**—The Long Eddy Hydraulic and Manufacturing Company was incorporated under the laws of New York, for the purpose of constructing and improving a water privilege on the Delaware river, at the village of Douglass, and of manufacturing lumber, etc. The legislature authorized it to erect a dam across the river, and take and flow such lands as might be necessary in its proper construction. In 1868 the legislature authorized the village of Douglass to subscribe to the stock of this corporation, and issue its bonds to raise the amount of its subscription. The bonds were issued and denominated on their face "internal improvement fund of the village of Douglass," and recited that they were issued under the act of 1868. It appeared that the accomplishment of the objects of the company would have increased the material growth and prosperity of the village; would have added a large taxing element thereto, increased the value of adjacent property, and furnished an extensive factory for lumber and other raw products; and the cleaning out of the channel of the river, the construction of docks and piers, objects within the scope of the powers of the corporation; would have promoted the public convenience in the transaction of business, and thus benefited the public.

The court of appeals, however, held that this corporation was a private corporation. Its purposes were not public, and the legislature could not authorize the village of Douglass to issue its bonds in aid of such a corporation, and provide for their payment by taxation. Mr. Justice Folger thus distinguishes a public from a private purpose: "It may also be conceded that that is a public purpose from the attainment of which will flow some benefit or convenience to the public, whether of the whole commonwealth or of a circumscribed community. In this latter case, however, the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each

[1] Osborne *v.* Adams Co., 106 U. S. 181, 109 U. S. 1.

citizen of the community affected may lay his own hand to in his own right, and take unto his own use at his own option, upon the same reasonable terms and conditions as any other citizen thereof. He may not be made to depend for it on the spontaneous action of others, or to receive it in uncertain degree or manner or round about way, or hampered with discriminating distinctions and conditions.''[1]

§ 181. **State law regulating storage of grain in warehouses a public purpose—Munn v. Illinois.**—This case arose upon an information filed in the criminal court of Cook county, Illinois, against Munn and others for transacting business in the city of Chicago as public warehousemen without a license. The history of the case in brief is as follows: In 1862, Munn, with others, constructed a warehouse and elevator in the city of Chicago, with their own means, upon ground leased by them for that purpose, and from that time until the filing of the information against them had transacted the business of receiving and storing grain for hire. The rates of storage charged by them were annually established by arrangement with the owners of different elevators in Chicago, and were published in the month of January. In 1870 the state of Illinois adopted a new constitution, and by it "all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses." In April, 1871, the legislature of the state passed an act to regulate these warehouses, thus declared to be public, and the warehousing and inspection of grain, and to give effect to this article of the constitution. By that act, public warehouses, as defined in the constitution, were divided into three classes, the first of which embraced all warehouses, elevators or granaries located in cities having not less than one hundred thousand inhabitants, in which grain was stored in bulk, and the grain of different owners was mixed together or stored in such a manner that the identity of different lots or parcels could not be accurately preserved. To this class the elevator of the defendants

[1] Weismer *v.* Village of Douglass, 64 N. Y. 91.

belonged. The act prescribes the maximum charges which the proprietor, lessee or manager of the warehouse was allowed to make for storage and handling of grain, including the cost of receiving and delivering it, for the first thirty days or any part thereof, and for each succeeding fifteen days or any part thereof; and it required him to procure from the circuit court of the county a license to transact business as a public warehouseman, and to give a bond to the people of the state in the penal sum of ten thousand dollars for the faithful performance of his duty as such warehouseman of the first class, and for his full and unreserved compliance with all the laws of the state in relation thereto. The license was made revokable by the circuit court upon a summary proceeding for any violation of such laws. And a penalty was imposed upon every person transacting business as a public warehouseman of the first class, without first procuring a license, or continuing in such business after his license had been revoked, of not less than one hundred dollars nor more than five hundred dollars for each day on which the business was thus carried on. The court was also authorized to refuse for one year to renew the license, or to grant a new one to any person whose license had been revoked. The maximum of such charges prescribed by the act for the receipt and storage of grain was different from that which the defendants had previously charged, and which had been agreed to by the owners of the grain. More extended periods of storage were required of them than they had formerly given for the same charges. What they formerly charged for the first twenty days of storage, the act allowed them to charge for the first thirty days of storage; and what they formerly charged for each succeeding ten days after the first twenty, the act allowed them to charge only for each succeeding fifteen days after the first thirty. The defendants deeming that they had a right to use their own property in such manner as they desired, not inconsistent with the equal right of others to a like use, and denying the power of the legislature to fix prices for the use of their property, and their services in connection with it, refused to comply with the act by taking out license and giving the bond required, but con-

tinued to carry on the business and to charge for receiving and storing grain such prices as they had been accustomed to charge and as had been agreed upon by them and the owners of the grain. For thus transacting their business without procuring a license, as required by the act, they were prosecuted and fined, and the judgment against them was affirmed by the supreme court of the state.

The case was appealed to the supreme court of the United States. The only question involved was the constitutionality of the statute authorizing the maximum charges for the storage of grain in warehouses at Chicago, and other places in the state having not less than one hundred thousand inhabitants. The question presented, therefore, was one of the greatest importance, whether it was within the power of the legislature of a state to fix the compensation which an individual may receive for the use of his own property, in his private business, and for his services in connection with it. The supreme court of the United States, in an opinion delivered by Chief Justice Waite, held that under the limitations upon the legislative power of the states imposed by the constitution of the United States, the legislature of Illinois can fix by law the maximum of charges for the storage of grain in warehouses, at Chicago and other places in the state. That the acts of the legislature of 1871, to regulate public warehouses, are not unconstitutional and void. And that when private property is devoted to public use it is subject to public regulation. The learned court, in delivering the opinion, used the following language: "It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this

particular manner. It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was, from the beginning, subject to the power of the body politic to require them to conform to such regulation as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriages and established his business before the statute or ordinance was adopted. It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps, more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there is no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to

yield to his terms, or forego the use. But a mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law and is no more sacred than any other. Rights of property which have been created by the common law can not be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by the constitutional limitations. Indeed the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one. We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts. After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the fourteenth amendment which is relied upon, viz.: that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' Certainly it can not be claimed that this prevents the state from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what can not be done in the one case in this particular can not be done in the other.''[1]

§ 182. **The dissenting opinion in Munn v. Illinois.**—Justices Field and Strong, dissenting from the judgment of the majority of the court in this case. The dissenting opinion was rendered by Justice Field, and the doctrine announced by him, in my judgment, is unanswerable. The principle upon

[1] Munn *v.* Illinois, 94 U. S. 113.

which the opinion of the majority proceeds is, declared Justice Field, "subversive of the rights of private property, heretofore believed to be protected by constitutional guarantee against legislative interference, and is in conflict with the authorities cited in its support. The declaration of the constitution of 1870, that private buildings used for private purposes shall be deemed public institutions does not make them so. The receipt and storage of grain in a building erected by private means for that purpose does not constitute the building a public warehouse. There is no magic in the language, though used by a constitutional convention which can change a private business for a public one, or alter the character of the building in which the business is transacted. A tailor's or shoemaker's shop would still retain its private character, even though the assembled wisdom of the state should declare, by organic act or legislative ordinance, that such a place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors by giving them a new designation. The defendants were no more public warehousemen, as justly observed by counsel, than the merchant who sells his merchandise to the public is a public merchant, or the blacksmith who shoes horses for the public is a public blacksmith; and it is a strange notion that by calling them so they would be brought under the legislative control. * * * The validity of the legislation was, among other grounds, assailed in the state court as being in conflict with that provision of the state constitution which declares that no person shall be deprived of life, liberty or property without due process of law, and with that provision of the fourteenth amendment of the federal constitution which imposes a similar restriction upon the action of the state. The state court held, in substance, that the constitutional provision was not violated so long as the owner was not deprived of the title and possession of his property; and that it did not deny to the legislature the power to make all needful rules and regulations respecting the use and enjoyment of the property, referring, in support of the position, to instances of its action in prescribing the interest on money, in establishing

and regulating public ferries and public mills, and fixing the compensation in the shape of tolls, and in delegating power to municipal bodies to regulate the charges of hackmen and draymen, and the weight and price of bread. In this court the legislation was assailed on the same ground, our jurisdiction arising upon the clause of the fourteenth amendment, ordaining that no state shall deprive any person of life, liberty or property without due process of law. But it would seem from its opinion that the court holds that property loses something of its private character when employed in such a way as to be generally useful. The doctrine declared is that property 'becomes clothed with a public interest when used in a manner to make it a public consequence, and affect the community at large;' and from such clothing the right of the legislature is deduced to control the use of the property and to determine the compensation which the owner may receive for it. When Sir Mathew Hale, and the sages of law in his day, spoke of property as affected by a public interest, and ceasing from that cause to be *juris privati* solely, that is, ceasing to be held merely in private right, they referred to property dedicated by the owner to public uses, or to property the use of which was granted by the government, or in connection with which special privileges were conferred. Unless the property was thus dedicated, or some right bestowed by the government was held with the property, either by specific grant or by prescription of so long a time as to imply a grant originally, the property was not affected by any public interest so as to be taken out of the category of property held in private rights. But it is not in any such sense that the terms 'clothing property with public interest' are used in this case. From the nature of the business under consideration—the storage of grain—which, in any sense in which the words can be used, is a private business, in which the public are interested only as they are interested in the storage of other products of the soil or in articles of manufacture, it is clear that the court intended to declare, that, whenever one devotes his property to the business which is useful to the public, 'affects a community at large,' the legislature can regulate the compensation which

the owner may receive for its use, and for his own services in connection with it. 'When, therefore,' says the court, 'one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, must submit to be controlled by the public for the common good, to the extent of the interest it has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control,' the building used by the defendant was for the storage of grain; in such storage, says the court, the public has an interest; therefore, the defendants, by devoting the building to that storage, have granted the public an interest in that use, and must submit to have their compensation regulated by the legislature. If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibition of the constitution against such invasion of private rights, all property and all business in the state are held at the mercy of a majority of the legislature. The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest; and according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection. If the owner does not like the rate prescribed, he may cease renting his houses; he has granted to the public, says the court, an interest in the use of the buildings, and 'he may withdraw his grant by continuing the use; but so long as he maintains the use, he must submit to be controlled.' The public is interested in the manufacture of cotton, woolen and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest, in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which

the owners of property thus employ shall ask for its use, that is the rate at which all the different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States.''[1]

§ 183. **Power to attach territory to municipality and issue street railway bonds.**—Under the provisions of a constitution, that the legislature can not authorize a municipal corporation to tax for its own local purposes lands lying beyond the corporate limits, the legislature has power to attach outside territory to the territory of a town and erect the territory so attached, together with the territory of the town, into a district, and authorize the district so formed to vote a subscription to the stock of a street railroad, and issue bonds in payment thereof, and an act to this effect was declared to be constitutional by the circuit court of the United States for the western district of Missouri.[2]

§ 184. **Bonds for building boarding house for normal school.** —In 1870 a special act was passed authorizing the city, then town of Emporia, to issue its bonds to the amount of six thousand dollars, "for the purpose of erecting and completing boarding houses for the use of students of the State Normal School," providing that no such bonds should be issued until the question had been submitted to the qualified electors of the town and approved by a majority vote. The question was submitted to a vote and lost. Thereafter, another ordinance was passed submitting the question a second time with the proviso that there should be paid annually into the city treasury, rents from such building sufficient to meet the interest on the bonds. This was approved by the popular vote; the bonds were issued, and out of the proceeds the boarding houses were built upon lots belonging to the city, and afterwards taken possession of and occupied by the Normal school authorities. It was held by the supreme court of that state, that the latter did not take and could not retain the possession of such buildings

[1] Munn *v.* People of Illinois, 94 U. S. 113.

[2] Henderson *v.* Jackson Co., 12 Fed. R. 676.

except subject to the conditions specified in the ordinance approved by the people, and rent not having been paid for a series of years, the city could recover possession of the buildings.[1]

Bonds for Private Purposes.

§ 185. **Bonds in aid of private business enterprises.**—However important it may be to the community that individual citizens should prosper in their industrial enterprises, it is not the business of a government to aid them with its means. Enlightened states leave every man to depend for his success and prosperity in business on his own exertions, in the belief that by doing so his own industry will be more certainly enlisted, and his prosperity and happiness more likely to be secured. It may, therefore, be safely asserted that taxation for the purpose of raising money from the public to be given, or even loaned to private parties, in order that they may use it in their individual business enterprises, is not recognized as for a public use. In contemplation of law, it would be taking the common property of the whole community and handing it over to private parties for their private gain, and consequently unlawful. And incidental benefits to the public that might flow from it could not support it as legitimate taxation.[2]

There is no power in the legislature to pass a law authorizing municipalities to issue bonds in aid of a private enterprise, conducted and owned by private individuals; that would be a plain taking of private property for private and not for public purposes. Because the bonds, when issued, are ultimately to be paid by a tax on the citizens, and if the purpose for which it is applied is not a public one every dollar thus paid is so much of the private property of the individual taken from him, under the forms of law, to be applied for the benefit of his neighbor conducting the private enterprise.[3]

The legislature can not legally and constitutionally exercise

[1] City of Emporia *v.* Partch, 21 Kan. 202.

[2] Allen *v.* Jay, 60 Me. 124, 11 Am. R. 185; Brewer Brick Co. *v.* Inhabitants of Brewer, 62 Me. 62.

[3] Weismer *v.* Village of Douglass, 64 N. Y. 91.

the right of taxation in such manner and to such extent as to compel or coerce the citizens to aid in the establishment of purely private enterprises or objects, nor for the payment of municipal bonds issued in aid of such private enterprises; and statutes enacted for such purposes are unconstitutional and void.[1]

As heretofore stated, it may not be easy to draw the line in all cases so as to decide what is a public purpose in its true sense, and on the other hand what constitutes a private purpose, or a private business enterprise. We shall, therefore, examine a number of the adjudicated cases by the courts of the highest character, where these questions have been under consideration.

§ 186. **The doctrine in Massachusetts—The Boston fire bonds.**—Soon after the disastrous fire in Boston in 1872, which laid an important part of that city in ashes, the governor of the state convened the legislative body of Massachusetts, called the general court, for the express purpose of affording some relief to the city and its people from the sufferings consequent on this great calamity. The legislature passed an act authorizing the city to issue bonds to an amount not exceeding twenty million dollars, the proceeds of which three commissioners, appointed by the mayor, were authorized to loan in a safe and judicious manner, "in such sums as they shall determine, to the owners of land, the buildings upon which were burned by the fire in Boston, on the 9th and 10th days of November, 1872, upon the notes or bonds of said owners, secured by first mortgages on said land; said mortgages to be conditioned that the rebuilding shall be commenced within one year from the first day of January, 1873, and said commissioners to have full power to apply the proceeds of said bonds in making said loans in such manner, and to make such further provisions, conditions and limitations in reference to said loans and

[1] Commercial National Bank of Cleveland *v.* City of Iola, 9 Kan. 689, 2 Dillon 353; Loan Assoc. *v.* Topeka, 20 Wall. 655; Coates *v.* Campbell, 37 Minn. 498; Feldman *v.* Charleston, 23 S. Car. 57; 1 Dillon on Mun. Corp., § 159.

securing the same as shall be best calculated, in their judgment, to secure the employment of the same in rebuilding upon said land burned over, and the payment thereof to the city." It will thus be seen that the object of this act, as expressed in its provisions, was, "to insure the speedy rebuilding on land the buildings upon which were burned" by the great fire; and the question was, as to the right of a state to impose any taxes for this object, and this depended upon the further question whether this object was, in a legal sense, a public object. In the case of Dowell *v.* Boston, in the supreme judicial court of Massachusetts, the validity of this act was considered. The court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose; that taxes can only be laid for some public service, or some object which concerns the public welfare; that the preservation of the interests of individuals, either in respect to property or business, although it may result incidentally to the advancement of the public welfare, is in its essential character a private and not a public object; that the incidental advantages to the public or to the state which result from the promotion of private interests, or the prosperity of private enterprises or business, does not justify their aid by taxation; that as a judicial question the case is not changed by the magnitude of the calamity which has created the emergency, and that the expenditure authorized by the provisions of the statute, being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature and the city, and it could not, therefore, legally issue the bonds, for the purposes named in the act.[1]

§ 187. **The doctrine in Maine—Allen v. Inhabitants of Jay.** —The inhabitants of the town of Jay, in a public town meeting, voted to loan their credit to the amount of ten thousand dollars to Hutchins & Lane, if they would invest twelve thousand dollars in a steam saw-mill, grist-mill and box factory machinery to be built in that town by them. At the request

[1] Lowell *v.* Boston, 111 Mass. 454, 15 Am. R. 39.

of the town, the legislature by a special act ratified the issue of bonds for the sum of ten thousand dollars, for the encouragement of manufacture in the town. There was a provision in the act to secure the town by a mortgage on the mill and the selectmen were authorized to issue town bonds for the amount of the aid so voted. Ten of the taxable inhabitants of the town filed a bill to enjoin the selectmen from issuing the bonds. The supreme judicial court of Maine, in an able opinion by Chief Justice Appleton, held that this was not a public purpose, and that the town could levy no taxes on the inhabitants in aid of the enterprise, and could, therefore, issue no bonds, though a special act of the legislature had ratified the vote of the town, and the court granted the injunction as prayed for in the bill The learned chief justice in delivering the opinion of the court used the following language: "If there is any proposition about which there is entire and uniform weight of judicial authority, it is that taxes are to be imposed for the use of the people of the state, in the varied and manifold purposes of government, and not for private objects or special benefit of individuals. Taxation originates from, and is imposed by and for, the state. The town of Jay stands in the some relation to this new mill as to all others, so far as regards any public benefit to be derived therefrom. The timber of the inhabitants is sawed at the usual compensation; their grists are ground for the same customary tolls as those of others. All labor conduces to the public benefit; but because all labor, all productive industry, conduces to the public benefit, does it follow that the people are to be taxed for the benefit of one man or of one special kind of manufacturing? The sailor, the farmer, the mechanic, the lumberman, are equally entitled to coerced loans, to enable them to carry on their business with Hutchins & Lane. Our government is based on equality of right. The state can not discriminate among occupations, for a discrimination in favor of one is a discrimination adverse to all others." And again the learned court used this strong language: "But whether the money raised is to be distributed per capita or loaned, can make no difference in principle. If towns can assess and collect money to be again

loaned to such persons as the majority may select for such purposes as it may favor, with such security, or without security, as it may elect, property ceases to be protected in its acquisition or enjoyment. And if the loan be made to one or more for a particular object, it is favoritism. It is a discrimination in favor of the particular individual, and a particular industry thereby aided, and is one adverse to and against all individuals, and industries not thus aided. If it is to be loaned to all, then it is practically a division of property under the name of loan. It is communism incipient, if not perfected.'"[1]

§ 188. **Bonds in aid of manufacturing enterprises.**—Municipal bonds issued under legislative authority in aid of manufacturing enterprises are invalid. A statute which authorizes municipalities to contract debts or other obligations payable in money, implies the duty to levy taxes to pay them, unless some other fund or source of payment is provided. If there is no power in the legislature which passes such a statute, to authorize the levy of taxes in aid of the purpose for which the obligation is to be contracted, the statute is void, and so are the bonds or other forms of contract based on the statute. There is no such a thing in the theory of our government, state and national, as unlimited power in any of their branches. The executive, the legislative and the judicial departments are all of limited and defined powers. There are limitations of such powers, which arise out of the essential nature of all free governments; implied reservations of individual rights, without which the social contract could not exist, and which are respected by all governments entitled to the name. Among these is the limitation of the right of taxation, that it can only be used in the aid of a public object, an object which is within the purpose for which the governments are established. It can not, therefore, be exercised in aid of enterprises strictly private, for the benefit of the individuals, though in a remote or collateral way the local public may be benefited thereby. Though the line which distinguishes the public use for which taxes may be assessed, from the private use for which they may not,

[1] Allen *v.* Inhabitants of Jay, 60 Me. 124.

is not always easy to discern, yet it is the duty of the court where the case falls clearly within the latter class, to interpose, when properly called on for the protection of the rights of the citizen, and aid to prevent his private property from being unlawfully appropriated to the use of others. The statute, therefore, which authorizes a municipality to issue its bonds in the aid of the manufacturing enterprise of individuals is void, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profit of others, and not for a public use, in the proper sense of that term.[1]

Municipal corporations, with or without the sanction of legislative authority, have no legal power to donate money, lend their credit, or issue their obligations, to aid in the erection or conduct of manufactories or other business enterprises owned or controlled by private persons, or as a means of securing the location of such enterprises in the particular community; taxation for such purposes is not legitimate, and such obligations, if issued, are void.[2]

Legislative authority to a city to borrow money on the credit of the city, and to issue bonds therefor, does not authorize the issue of its bonds, as a donation to a company or individual, to be used in the improvement of the water power within and near the city, to secure the practical and permanent use of said power to the city and its immediate vicinity. The power contained in the charter of a city to borrow money does not authorize the issue of its bonds, unless they are issued for a corporate purpose, where there is a constitutional prohibition against taxation by the city except for corporate purposes. Municipal corporations have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied, except such as are essential to the objects and purposes of the corporation as created and established. To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do,

[1] Loan Association *v.* City of Topeka, 20 Wall. 655.

[2] Parkersburg *v.* Brown, 106 U. S. 487.

but beyond their corporate powers their acts are of no effect. The power to govern a city, therefore, does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes.[1]

The general grant of legislative power in the constitution of the state does not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes; it can not, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. And, therefore, the legislature of Missouri had no constitutional power to authorize a city to issue its bonds by way of donation to a private manufacturing corporation.[2]

§ 189. **Township aid bonds.**—In 1873 the legislature of Kansas passed a law authorizing Blue Rapids township, in Marshall county, to take stock in and issue bonds to the Irving Manufacturing Company, a corporation then organized, whose purpose, as expressed in its charter, was "to purchase all needed lands and construct and maintain a dam across the Blue River, within two miles of Irving, and build and maintain mills and their machinery for manufacturing purposes." Bonds were thereafter voted and issued, reciting on their face that they were issued to said corporation and in pursuance to said act, whose title and date of approval were given. The supreme court of Kansas held, in an action to restrain the collection of taxes levied for interest on said bonds, that the law was unconstitutional as authorizing public aid to purely private purposes, and that therefore the bonds issued in pursuance of said law were void.[3]

In 1871 the legislature of Kansas passed a law authorizing the city of Iola, through its mayor and council, to appropriate

[1] City of Ottawa *v.* Carey, 108 U. S. 110.

[2] Cole *v.* City of La Grange, 113 U. S. 1.

[3] C. B. U. P. R. Co. *v.* Smith, 23 Kan. 745.

the sum of fifty thousand dollars as a donation or bonus to aid in the erection and completion of buildings at or near said city to be used for the purpose of manufacturing King's patent bridges, as a foundry and iron works, and to issue the bonds of said city to the amount of fifty thousand dollars, in sums of not less than one hundred dollars each, payable fifteen years after date, and bearing interest at the rate of ten per cent. per annum, with interest coupons attached, payable semi-annually; and the act also authorized and required the levy and collection of such taxes as will be necessary to pay the interest and principal of the bonds so issued. In an action brought by the Commercial National Bank, of Cleveland, Ohio, against the city of Iola to recover the amount of certain matured coupons attached to the bonds, the validity of the act of the legislature authorizing the city of Iola to issue the bonds was considered by the circuit court of the United States for the District of Kansas in 1873. The court, in an able opinion by Judge Dillon, held that the legislature can not legally and constitutionally exercise the right of taxation in such manner and to such extent as to compel or coerce the citizens to aid in the establishment of purely private enterprises, or objects, nor for the payment of municipal bonds issued in aid of such enterprises; and statutes enacted for such purposes are unconstitutional and void. "Taxation," said the court, "is a mode of raising a revenue for public purposes. When it is prostituted to objects in no way connected with the public interest, it ceases to be taxation and becomes plunder; and the establishment of a bridge manufactory or foundry, owned by private individuals, is essentially a private enterprise. And bonds issued by any municipality in aid of strictly private enterprises are void—void from the beginning—and void into whatsoever hands they may have come. All persons must, at their peril, take notice of the power of municipal corporations or officers to issue securities, and especially is this so where the want of power results from constitutional prohibitions or provisions."[1]

[1] Commercial National Bank of Cleveland *v.* City of Iola, 2 Dillon 353, 9 Kan. 689.

§ 190. **Bonds for relief purposes.**—These two propositions are firmly established by the courts in this country: First, that taxation to be sustained must be for a public purpose; second, that where municipal bonds are issued, whose payment is provided for solely by taxation, their validity depends upon the question whether the purposes to which the proceeds of such bonds are to be applied are public purposes.[1]

Hence an act of the legislature authorizing the issue of "bonds for relief purposes," in that it provides for the issue of bonds and the levy of taxes for other than public purposes, was declared to be unconstitutional, and therefore void.[2]

Thus, in 1875, the legislature of Kansas passed a law authorizing townships to issue bonds for "relief purposes." Pursuant to this act of the legislature the electors of the township of Osawkee, Jefferson county, at an election called and held for that purpose, voted for the issuance of relief bonds to the amount of six thousand dollars. An injunction was brought by certain resident citizens and tax-payers in the township against said township and its officers to restrain them from issuing the bonds. A temporary injunction was granted by the district court. But upon a final hearing of the cause the temporary injunction was dissolved, and the case was appealed by the relators to the supreme court for review. The only question presented by the record was whether the act of the legislature authorizing the township to issue bonds for "relief purposes" was constitutional. The supreme court, in an able opinion by Justice Brewer, held that the act was unconstitutional. In the course of the opinion the learned justice said: "The purpose of the act is to provide the destitute with provisions and with grain for seed and feed. This legislation must be construed in the light of known facts. For reasons unnecessary here to recount, in some portions of the state there was a total and in others a partial failure of the crops. It was generally understood that many farmers would come to this

[1] Comm'rs of Leavenworth Co. *v.* Miller, 7 Kan. 479; McConnell *v.* Hamm, 16 Kan. 228; C. B. U. P. R. Company *v.* Smith, 23 Kan. 745; Lowell *v.* City of Boston, 111 Mass. 454; Allen *v.* Inhabitants of Jay, 60 Me. 124; Loan Association *v.* Topeka, 20 Wall. 655.

[2] State *v.* Osawkee Tp., 14 Kan. 418.

spring sowing with little or no seed, and with stock weakened for lack of grain. To make good this lack is the evident purpose of the act, to provide for grain for seed and feed. Its aim is not to furnish food to the hungry, clothing to the naked, or fuel to those suffering from the cold. It is not the helpless and dependent whose wants are alone sought to be relieved. If it were, the fact that many who are neither helpless nor dependent might obtain assistance through its administration would be no valid objection to the constitutionality of the law. It contemplates a class who have fields to till and stock to care for, and proposes to help them with seed for their fields and grain for their stock, that thus they may pursue with better prospects of success their ordinary avocations. It taxes the whole community to assist the one class, and not for the purpose of relieving actual want, but to assist them in their regular occupations. These people are engaged in the business of farming. This business can not be successfully carried on without seed, nor without stock strong enough to do ordinary work. They are destitute of seed, and their stock required grain. Hence the tax upon the community. The principle would be the same if their supply of grain was insufficient, but through the prevalence of epizootic, or some other disease, their stock had all died. Could a tax be sustained to purchase stock for their ordinary farming work? Or, again, suppose some prairie fire, driven by a fearful wind, sweeps through a country, consuming its fences and farming tools, can a tax be sustained to supply this loss, and enable the farmers to prosecute their labors? Nor can the inquiry be limited to a single class. Were the carpenters or shoemakers, or any other industrial class, located in a separate quarter of the city, and their tools and stock in trade swept away by fire, could a tax be sustained to purchase a new set of tools and new stock in trade to enable them to prosecute their business and secure support for themselves and families? No distinction in principle can be made between these different supposed cases and the case at bar. They all rest upon this proposition, that a tax is laid upon the

public to furnish one class the means of carrying on its regular occupation.'"[1]

§ 191. **Public aid for sectarian schools and colleges.**—The officers of a municipal corporation have no power to subscribe or donate public money in aid of private sectarian schools or colleges, and a tax imposed on the property of the citizens within the corporation for that purpose is, therefore, absolutely void.[2]

The fact that an institution of learning teaches the doctrines of a particular church or religious sect, and that all exercises of religious character are those of such church, will render the institution sectarian within the meaning of the Illinois constitution, prohibiting the payment from any public fund of anything in aid of any church or sectarian purpose, although all its pupils may not be instructed in such sectarian doctrines.[3]

The county boards, under the constitution and statute of Illinois, have no power to appropriate county funds in aid or support of sectarian schools, or of any school controlled by a church or religious denomination.[4]

Appropriations in aid of exhibits at the Centennial Exposition and World's Fair have given rise to a number of decisions. The courts have almost unanimously held that this was a public purpose, and that such appropriations might be authorized by the legislature.[5]

Similar appropriations for public anniversaries and holiday celebrations have also been upheld.[6]

[1] State *v.* Osawkee Tp., 14 Kan. 423.

[2] Atchison, etc., Railroad Co. *v.* City of Atchison, 47 Kan. 712.

[3] County of Cook *v.* Chicago Industrial School for Girls, 125 Ill. 540; State of Nevada *v.* Hallock, 16 Nev. 373; Cooley's Const. Lim., page 580.

[4] Stevens *v.* St. Mary's Training School, 144 Ill. 336.

[5] State *v.* Cornell (Neb.), 39 L. R. A. 513; Daggett *v.* Colgan, 92 Cal. 53, 14 L. R. A. 474; Norman *v.* Kentucky Board, etc., 93 Ky. 537, 18 L. R. A. 556; Shelby County *v.* Tennessee, etc., Co., 96 Tenn. 653, 33 L. R. A. 717. But see Hayes *v.* Douglas County, 92 Wis. 429, 31 L. R. A. 213; Hood *v.* Mayor, etc., of Lynn, 1 Allen, 103; City of New London *v.* Brainard, 22 Conn. 552.

[6] Hubbard *v.* City of Taunton, 140 Mass. 467; Hill *v.* Selectmen of Easthampton, 140 Mass. 381; Tatham *v.* City of Philadelphia, 11 Phila. 276. This doctrine ought not, however, to be extended too far. But an appropriation for an agricultural society for fitting up fair grounds has also been upheld. State, etc., *v.* Robinson, 35 Neb. 401.

CHAPTER IX.

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General Principles.

§ 192. **General conditions preceding the issuing of bonds.**— The issue of municipal bonds is, as a general rule, authorized upon the performance of certain conditions precedent. Such conditions may be imposed by a constitutional provision, by legislative act, or by the municipal authorities. Conditions imposed by the constitution, or legislature, must be strictly complied with. Such a condition is the common one requiring the assent of the voters or taxpayers of the municipal body. Municipal bonds are generally issued by officers designated in the statute authorizing the issue. And when issued for ordinary municipal purposes the officers charged with the duties relating to the care, management and control of the city and its finances are usually the proper persons to issue the bonds. In the case of bonds issued in aid of railroad companies, or other works of internal improvement, the authority is frequently conferred upon commissioners, who are not the officers of the municipality, and have no duties to perform in relation to the bonds except those pertaining to their issue. But whether the bonds are issued by the municipal authorities or a commission designated for that purpose, their powers are all delegated; and they derive their authority to act from the statute and can not exceed the powers thus vested in them. These statutes, as a general rule, contain provisions directing what shall be done before the officers issue the bonds. A common provision is that an election shall be held, to ascertain the sense of the people upon the proposition for which the bonds are to be issued. The statute authorizing the issue of bonds frequently contains a provision which requires the written assent of taxpayers to be obtained and filed in some public office, and in respect to railroad aid bonds provision is sometimes made requiring the railroads to be located in a particular direction, or

the railroad to be completed, or some similar condition is required before the proper officers can legally issue the bonds. These are usually conditions precedent and must be complied with before the officers have any power to act in the premises.[1]

When no conditions are required by the law, a municipal corporation may make the subscription upon such conditions as are deemed necessary to protect its interest. The courts have uniformly held that an authority to subscribe for stock in aid of a railway includes authority to make a conditional subscription.[2]

So a municipality may provide for submitting a question of aid to a vote though not expressly required to do so by the statute.[3]

§ 193. **Power to determine, when can not be delegated.**—A case arose in Illinois on a bill for an injunction and to direct that certain bonds, prepared under the order of the county court and delivered to parties in trust for a railway company, be surrendered to the corporate authorities of the county. The order of the county court provided that the clerk should prepare the bonds with the date blank, and, when so prepared, deliver them to the trustees appointed by the court. Authority was given the trustees by order of the court to date and deliver the bonds, after the conditions precedent to their delivery had been complied with. The court held, that it was quite clear that the undated bonds in the hands of the parties named as trustees should be surrendered to the corporate authorities of the county. No authority could be found for placing them in the hands of the trustees, with directions,

[1] Leavenworth, etc., R. R. Co. *v.* Platt Co., 42 Mo. 171; Town of Eagle *v.* Kohn, 84 Ill. 292; Essex County R. R. Co. *v.* Lunenburgh, 49 Vt. 143, 2 Elliott R. R., §§ 822, 856, 859, 893.

[2] Jacks *v.* City of Helena, 41 Ark. 213; Atchison, etc., R. R. Co. *v.* Jefferson Co., 21 Kan. 309; Brocaw *v.* Gibson Co., 73 Ind. 543; People *v.* Holden, 91 Ill. 446; Portland, etc., R. R. Co. *v.* Hartford, 58 Me. 23; Packard *v.* Jefferson Co., 2 Colo. 338; Falconer *v.* Buffalo R. R. Co., 69 N. Y. 491; Townsend *v.* Lamb, 14 Neb. 324; California, etc., R. R. Co. *v.* Comrs. of Butte Co., 18 Cal. 671; Coe *v.* Caledonia, etc., R. R. Co., 27 Minn. 197; Hodgman *v.* Chicago, etc., R. R. Co., 20 Minn. 48; Bittenger *v.* Bell, 65 Ind. 445; 2 Elliott R. R., § 852.

[3] Mason *v.* City of Shawneetown, 77 Ill. 533.

when they should deem the conditions on which the subscriptions had been complied with, to deliver them to the railroad company in payment of stock to be issued to the county. Conceding the subscriptions had been authorized by a vote of the people of the county, nevertheless it was upon express conditions annexed, and no liability rested upon the county to issue the bonds until these conditions had been fully performed. Who is to determine when these bonds shall be issued and delivered to the railway company, if at all? Clearly, it must be the regularly constituted officers of the county, elected by the people, and entrusted with the management of all the financial affairs of the county and all the municipal affairs. This is an official trust which neither a county court nor its successor, the board of supervisors, could delegate to strangers owing no obligation or allegiance to the county. The reasons for these obligations are obvious. In the first place, the people had never assented that anyone, other than the proper officers of the county, should judge of the performance of the conditions precedent on which the subscriptions had been voted; and, in the second place, should a controversy arise, it is all important that the bonds should be in the hands of these officers until the matter should be finally adjudicated. Should the trustees abuse the confidence reposed in them, by improperly dating and delivering the bonds, the county might suffer irreparable injury. They are in no sense county officers, and owe no obligation to it, as such, for the performance of the trust. They have not been entrusted by any vote of the people whose interests are to be affected, nor by any law of the state, with the extraordinary powers with which the county court has attempted to clothe them. Functions to be exercised by county officials can not, without special authority given by law, be delegated to strangers with power to act in their stead.[1]

But a statute providing that county bonds shall not be delivered by the county commissioners until certain conditions had been complied with, and not indicating any person or tri-

[1] Board of Jackson Co. *v.* Brush, 77 Ill. 59.

bunal to determine the fact, necessarily delegates it to the county commissioners.[1]

And where the facts, upon the existence of which bonds are to be issued, are exclusively within the knowledge of the city council, which is authorized to issue the bonds, it will be inferred that the lawmakers intended to make such council the judge whether such conditions had been fulfilled.[2]

§ 194. **Conditions precedent, how construed.**—The power to issue bonds may be conferred upon certain officials as representatives of the corporation, but this power is more generally made to depend upon the assent of a certain proportion of the voters or tax-payers signified by the petition to the proper officers or manifested at a general or special election held for such purposes. These provisions have been construed by the courts as mandatory, and the use of the word "may" instead of "shall" does not render compliance with them optional.[3]

Where the constitution or the legislature prescribes certain conditions precedent to the granting of aid to railroads, it is necessary, except in some cases where the question of power arises between municipalities and an innocent holder for value of its bonds, that there should be a compliance with all substantial or material requirements, and if it appears that the conditions upon which the bonds were to be issued have not been complied with, their issue will be enjoined to prevent them from passing into the hands of innocent holders for value, and where the bonds have been issued they may be declared void, and ordered canceled in the hands of the original holder, or any subsequent holder with knowledge of their defects.[4]

[1] Comrs. of Knox Co. *v.* Nichols, 14 Ohio St. 260.

[2] Mutual Benefit Life Ins. Co. *v.* City of Elizabeth, 42 N. J. L. 235.

[3] Mo. River, etc., R. R. Co. *v.* Comrs. of Miami Co., 12 Kan. 230; Lewis *v.* Comrs. of Bourbon Co., 12 Kan. 186; Steines *v.* Franklin Co., 48 Mo. 167; Leavenworth, etc., R. R. Co. *v.* Platt Co., 42 Mo. 171; Portland R. R. Co. *v.* Standish, 65 Me. 63; Hayes *v.* Holly Springs, 114 U. S. 120; Allen *v.* Louisiana, 103 U. S. 80; Hawkins *v.* Board, etc., of Carrol Co., 50 Miss. 735; State *v.* School District No. 9, 10 Neb. 544; Smith *v.* Clark Co., 54 Mo. 58; State *v.* Green Co., 54 Mo. 540.

[4] Chambers County *v.* Clews, 21 Wall. 317; Union Pacific R. R. Co. *v.* Lincoln Co., 3 Dill. (U. S.) 300; Union Pacific R. R. Co. *v.* Merrick Co., 3 Dill. 359; Packard *v.* Board, etc., of

The supreme court of Illinois has held that the language of the condition must be construed according to its ordinary meaning, that is, as it would be understood by the voters.[1]

It is said, however, that the fact that bonds are issued creates a legal presumption that all conditions precedent have been complied with.[2]

When a condition is imposed by a vote of the people it can not be changed by subsequent elections without new authority unless the first election was ineffective. Such conditions can not be modified by the officers of the corporation. They can act only on the proposition submitted to and approved by the voters.[3]

§ 195. **Waiver of conditions.**—The supreme court of the United States has held that a municipal corporation possesses the power to alter its legally made contracts by waiving conditions found to be injurious to its interests, and can estop itself like other parties to a contract. Thus where a county expressly agreed to extend the time of completing a railroad, and, before the time expired, declared the railroad to be completed to its satisfaction, delivered its bonds to the company and received its stock in return, which it still holds and owns, this constitutes a waiver and an estoppel which prevents the county from raising the objection that the contract had not been performed in time.[4]

The supreme court of Illinois has held, in an action to sell lands delinquent for non-payment of taxes, where a part of the tax on the roll is for the payment of principal or interest on bonds issued in aid of a railroad, that the defense will not be allowed that the condition on which the aid was to be extended

Jefferson Co., 2 Colo. 338; Portland R. R. Co. *v.* Hartford, 58 Me. 23; Cairo, etc., R. R. Co. *v.* Sparta, 77 Ill. 505; Belo *v.* Comrs. of Forsythe Co., 76 N. Car. 489; 2 Elliott R. R., § 893.

[1] People *v.* Town of Clayton, 88 Ill. 45.

[2] Commonwealth *v.* Pittsburg, 43 Pa. St. 391; Belo *v.* Comrs. of Forsythe Co., 76 N. Car. 489.

[3] State *v.* Daviess Co., 64 Mo. 30; People *v.* Supervisors, etc., Town of Waynesville, 88 Ill. 469; Town of Plattville *v.* Galena, etc., R. R. Co. 43 Wis. 493; Board, etc., of Douglass Co. *v.* Walbridge, 38 Wis. 179.

[4] County of Randolph *v.* Post, 93 U. S. 502.

had not been complied with; it will be considered as waived. And when the statutes required the bonds to be signed by a designated officer and to be countersigned by the treasurer, the omission of the treasurer to countersign was not considered sufficient to justify an injunction to restrain a tax levied to pay the bonds.[1]

The issue of bonds has also been held to raise the presumption that conditions precedent, imposed by ordinance, have been complied with or waived.[2] This is certainly so where the bonds recite in substance that they are issued under and pursuant to the enabling act.

Elections and Assent of Tax-payers or Voters.

§ 196. **Elections, when a condition precedent.**—A common condition precedent to the issue of bonds is the requirement of the consent of a certain proportion of the tax-payers or voters, to be ascertained at a general or special election. This is now required by the constitution or statute in nearly all the states as a condition to the issue of all bonds. Where the constitution of a state requires the assent of two-thirds of all the qualified voters of a county, city or town as a prerequisite to a subscription to a railroad or other company, bonds of a township issued without such consent, for such purposes, are invalid.[3]

A case in 1872 arose in the supreme court of the United States from the state of Nebraska, which involved the question whether the county commissioners of Otoe county, Nebraska, could, under the act of February 16, 1869, lawfully issue one hundred and fifty thousand dollars in bonds in aid of the Burlington and Missouri Railroad Company, without the proposition to vote the bonds for such purpose, and also a tax to pay the same being or having been submitted to a vote of the people of the county, as provided by the act of the territorial legislature of Nebraska, passed January 1, 1861. The supreme

[1] Chiniquy *v.* People, 78 Ill. 570; Melvin *v.* Lisenby, 72 Ill. 63, 22 Am. R. 141.

[2] Commonwealth *v.* Pittsburg, 43 Pa. St. 391; Gilchrist *v.* Littlerock, 1 Dillon 261; Danielly *v.* Cabaniss, 25 Ga. 211.

[3] Harshman *v.* Bates Co., 92 U. S. 569.

court held that if the legislature had power to authorize the county officers to extend aid on behalf of the county or state, to a railroad company, as we have seen it had, very plainly it could prescribe the mode in which such aid could be extended, as well as the terms and conditions of the extension, and it needed no assistance from the popular vote of the municipality. Such a vote could not have enlarged the legislative powers. But the act of 1869 was an unconditional bestowal of authority upon the county commissioners to issue the bonds to the railroad company. It required no precedent action of the voters of the county. It assumed that the assent had been obtained. That prior to 1869 the sanction of approval by a local popular vote had been required for municipal aid to railroad companies, or improvement companies, is quite immaterial. The requisition was but the act of an annual legislature, which any subsequent legislature could abrogate or annul; and, therefore, the county commissioners could lawfully issue the bonds, without any submission to a vote of the people of the county of the proposition to approve the bonds, or a tax for the payment thereof.[1]

Under the constitution of Nebraska a municipal corporation can make donations of bonds for works of internal improvement only when authorized by the legislature, and after a vote of the electors in favor of the proposition.[2]

County bonds issued under the statutes of Kansas are not invalid, for the reason that the only vote taken by the electors of the county was before the passage of the act authorizing it, where the law authorized the adoption of such previous vote by the electors.[3] Bonds issued in payment of the subscriptions to the stock of railroad companies without a vote of the people are not invalid under a new constitution of Missouri if the subscription was made under authority of charters previously granted which did not require such a vote.[4] But where a state gives power to county courts to borrow money and issue bonds

[1] Chicago, B. & Q. R. R. Co. *v.* Otoe Co., 16 Wall. 667.

[2] Dixon Co. *v.* Field, 111 U. S. 83.

[3] County of Leavenworth *v.* Barnes, 94 U. S. 70; Comrs. of Johnson Co. *v.* Thayer, 94 U. S. 631.

[4] County of Ralls *v.* Douglass, 105 U. S. 728; County of Schuyler *v.* Thomas, 98 U. S. 169.

for railroad purposes, if authorized by a vote of the people, the power conferred is upon a condition precedent, and can not be exercised unless the proposed expenditure is approved by the voters.[1]

Where an act of the legislature authorized a municipality to subscribe stock to a railroad company and issue bonds therefor, but provided that no such subscription should be made until sanctioned by the legal voters of such municipality, and that if an election had already been held it was not necessary to hold another election for such a purpose, the election held before the act was passed was sufficient authority for the municipality to make the subscription.[2]

Bonds issued by a municipal corporation without legal power to do so, because not authorized by a vote of the legal voters, can not, however, be made valid by a statute after the adoption of a state constitution prohibiting the legislature from authorizing the issuance of such bonds without such vote.[3]

In Illinois, under the act of 1869, any condition imposed by a vote of the county as a condition precedent to the issuance of its bonds in payment of a subscription to the capital stock of a railroad company must have been complied with in order to make such bonds valid and binding.[4]

§ 197. **Effect of voting for railway aid bonds in excess of amount authorized by statute.**—The voting for an issue of bonds in excess of the amount allowed by statute does not necessarily invalidate the vote, and bonds may be issued thereunder up to the lawful limit; but where, at the same election, bonds are voted for two railroads, in amounts which, taken singly, are in excess of the limit, and the subscription is first made by the county commissioners to one of the roads for the full amount voted for it, a subsequent subscription to the other is entirely void.[5]

[1] Ritchie *v.* Franklin Co., 22 Wall. 67.

[2] St. Joseph Township *v.* Rogers, 16 Wall. 644.

[3] Katzenberger *v.* Aberdeen, 121 U. S. 172.

[4] German Savings Bank *v.* Franklin Co., 128 U. S. 526.

[5] Rathbone *v.* Board of Commissioners, 73 Fed. R. 395; Chicago R. R. Company *v.* Board, etc., of Osage Co., 38 Kan. 597, 16 Pac. R. 828. But

§ 198. **When election a question of jurisdiction.**—The supreme court of Kansas has held that when an election is required before bonds are issued and a majority is necessary to vote in favor of the proposition, such a vote is essential to give the municipal authorities jurisdiction to act in the premises.[1]

The supreme court of the United States, in passing upon this question, held that if a majority of the electors cast their votes against the proposition to issue bonds, the entire foundation of the proceedings is gone. There is an absolute want of jurisdiction in the matter to proceed further, and an attempt to do so is void, as are all proceedings or issues based upon it. Upon this point all the decisions of this court, and, so far as we know of, all other courts concur.[2]

A case arose in the supreme court of Illinois involving municipal aid to railroads where the act required a call of ten legal voters to authorize the supervisors to order an election for the purpose of issuing bonds in aid of a railroad. The call was signed by three persons who were aliens, and not legal voters, and these three persons voted in favor of the proposition. Without these three votes the proposition for aid would have been defeated. The railroad authorities had knowledge of these facts. It was held in a proceeding in mandamus to compel the issue of bonds that such action would not lie and that the bonds could not be issued.[3]

§ 199. **The effect of a popular vote.**—The general effect of a popular vote is to empower the proper officers to act in the matter and to bind the municipality by formal subscription. When the vote is taken upon a proposition to aid a railroad, the officer whose duty it is to make the subscription and issue the bonds must follow the provisions of the proposition accepted by the people. He can not alter them in any manner

when bonds are actually issued in excess of the *constitutional* limit they are void even in the hands of a so-called *bona fide* holder. Hedges *v.* Dixon County, 150 U. S. 182.

[1] Lewis *v.* Com'rs, etc., 12 Kan. 186; Mo. River, etc., R. R. Co. *v.* Com'rs, etc., 12 Kan. 234.

[2] Commissioners *v.* Thayer, 94 U. S. 641.

[3] People *v.* Cline, 63 Ill. 394; People *v.* Supervisor, 88 Ill. 202.

of substance, nor can the municipal authorities, such as the council of the city, change the terms of aid, or alter the conditions upon which it is given. It has even been held that the people themselves can not, by a second vote, change the terms of the first submission; their power is exhausted when the vote is once taken. Thus, where a railroad proposition for aid, upon specified terms, for a route indicated in the submission, was accepted by a vote of the people of the town, it was held by the supreme court of Wisconsin, that the modification of the submission by the representatives of the town was not valid, and that the issue of the bonds upon the terms of a modified submission, would be restrained in a proper action.[1]

The supreme court of the United States has held that when the popular vote gives authority to subscribe to one railroad company and the subscription is made and the bonds are issued to a different company, such vote does not authorize such subscription, and where such facts are recited in the bonds, there can be no *bona fide* holder of them.[2]

It has been held, however, that where there was no limitation in a statute as to the time when or the number of times the voters might be called upon to decide the question of subscription in aid of a railroad, such question may be twice submitted to them.[3]

Under the Michigan statute of March, 1869, the donation by a city of its bonds to aid in the construction of a railroad may be upon such conditions as are prescribed by a popular vote, and a condition so prescribed that the citizens of such city should receive such bonds to an amount equal to the stock they might subscribe and pay for not exceeding the amount of the

[1] Town of Platteville *v.* The Galena, etc., R. R. Co., 43 Wis. 493; People *v.* Batchellor, 53 N. Y. 128; Town of Duanesburgh *v.* Jenkins, 57 N. Y. 177; People *v.* County of Tazewell, 22 Ill. 147; Land Grant R. & Trust Co. *v.* Board, etc., 6 Kan. 256; Board, etc., *v.* Louisville, etc., R. R. Co., 39 Ind. 192; Hodgman *v.* Chicago & St. Paul Ry. Co., 20 Minn. 48. See, also, Kansas City, etc., R. Co. *v.* Rich. Tp., 45 Kan. 275. But the power to aid is generally continuous. 2 Elliott R. R., § 828.

[2] County of Bates *v.* Winters, 97 U. S. 83.

[3] Supervisors *v.* Galbraith, 99 U. S. 214. See, also, Society for Savings *v.* City of New London, 29 Com. 174.

bonds donated, was declared by the supreme court of the United States to be valid.[1]

In 1883, a case arose in the supreme court of the United States from Ohio, in which this subject was considered and discussed by the court. The court held that where any county of a state through which a railroad is located is authorized by a state act to subscribe to the stock of the road, on the subscription being approved by the voters of the county, and if the county should not be so authorized by such vote, then any township therein through which the road passes is authorized to subscribe to such stock if the voters of the town should vote in favor of the subscription, a township is without power to make a subscription until the time arrives when it can be properly said that the county, as such, has not been authorized by a vote of the electors to make a vote of the subscription. Under such a law, where a county had been authorized by a popular vote to subscribe, and it did in fact subscribe, to the stock of a railroad company, a township therein is without legal authority to make such a subscription.[2]

The inhibition imposed by the constitution of Tennessee in regard to giving or loaning the credit of a county, city or town to any person, company, association, or corporation, and providing that a county, city or town shall not become a stockholder in a corporation except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at such election, operates directly upon the municipality itself, and is absolute and self-executing and such county, city or town is destitute of power to give or loan its credit or to become a stockholder, until legislation authorizing the election and action thereupon is had.[3]

§ 200. **The rule of assent of voters in New York.**—In New York and several other states municipal aid to railroads is treated as a contract made between a majority of the tax-payers

[1] Taylor *v.* Ypsilanti, 105 U. S. 60; New Buffalo *v.* Iron Co., 105 U. S. 73.

[2] Northern Bank of Toledo *v.* Porter Tp. Trustees, 110 U. S. 608.

[3] Norton *v.* Board of Com'rs, etc., 126 U. S. 479.

and the railroad company. The consent of the majority binds the municipality. The consent of the parties must be given in writing and before any action can be taken by the officers whose duty it is to issue the bonds, it is the duty of the county court to determine judicially whether or not the conditions have been complied with. In these proceedings, which are called town bonding, all the evidence is made a part of the record by the court. Each tax-payer determines for himself whether he will be taxed. He gives his written consent, and whether that consent has been given is determined just as the question of consent to any other written proposition.[1]

These proceedings are commenced by petition to the county judge, praying that he may direct the town to be bonded to aid a certain railroad. It must be signed by a majority of the tax-payers as shown by the last preceding assessment roll. The fact must be established by common law evidence. The tax-payers must themselves assent. The power which is conferred on them, like elective franchise, is personal, and not to be exercised by an agent, nor to be delegated. It is not sufficient to prove the signature to the petition ; there must be evidence to personally identify the petitioners with those whose names are on the assessment roll. Where both are identical this would be *prima facie* evidence that the person is the same. The petition is the basis of these proceedings, and it must state facts sufficient to give the county judge jurisdiction. The authority is special ; it is not a part of the general jurisdiction of the court so that the defect of jurisdiction must be pleaded.[2]

The petition is addressed to the county judge, who has no power to accept or reject the condition, and consequently none to make the petition effective. The presentation of a petition lies at the basis of his jurisdiction, and if any facts required to be stated are omitted all the other proceedings are fatally defective.[3]

[1] People *v.* Smith, 45 N. Y. 772; People *v.* Knowles, 47 N. Y. 415; People *v.* Hulburt, 46 N. Y. 110.

[2] People *v.* Spencer, 55 N. Y. 1.

[3] Craig *v.* Town of Andes, 93 N. Y. 405; People *v.* Smith, 55 N. Y. 135; Town of Wellsboro *v.* New York, etc., R. R. Co., 76 N. Y. 182.

Under a special act authorizing a town to subscribe to stock and issue bonds, the affidavit of a majority of the assessors, to the effect that a majority of the tax-payers owning a majority of the taxable property has consented thereto, was made a condition precedent to the issue of the bonds, and also proof of such assent was required. The affidavit was considered in the nature of a judgment, and the signers of consents had the same right to withdraw their names before the affidavit was made by the assessors, that they had before the petition was presented to the county judge, under the general law.[1]

It was asserted under the statute of 1852, which required written assent of tax-payers, that an affidavit was evidence of the assent. The act required an affidavit "to the effect that the persons whose written assents are thereto attached and filed as aforesaid, comprise two-thirds of all the resident tax-payers of said town on its assessment roll next previous thereto," should be filed with the assent. The supreme court of New York held that such was not the function of the affidavit; that the object of the affidavit was to verify the fact that the persons whose names purported to be subscribed to these assents comprised two-thirds of all the resident tax-payers on the assessment roll. And under the act the burden of proof was on the bond-holder to show, in a suit against the town, that two-thirds of the resident taxables had given their assent to the creation of the bonds.[2]

§ 201. **The rule in Indiana and Illinois.**—In Indiana, under the act of March 14, 1867, a petition of a majority of the resident freeholders of a city was necessary to authorize the donation to a railway, but it was not necessary to authorize the subscription to the stock of a railroad company.[3]

In Illinois, where the charter of a railway company provides that upon the written application of ten voters of any city, county or town, filed with the clerk, an election shall be

[1] People *v.* Sawyer, 52 N. Y. 296; Orleans *v.* Platt, 99 U. S. 676.

[2] Starin *v.* Town of Genoa, 23 N. Y. 439; Gould *v.* Town of Sterling, 23 N. Y. 456.

[3] Thompson *v.* City of Peru, 29 Ind. 305. See, however, City of Madison *v.* Smith, 83 Ind. 502; State *v.* Mayor, 108 Ind. 74; Jussen *v.* Board, 95 Ind. 567.

held to determine the question of subscription to the stock of the company, such written application is necessary to the validity of the subscription.[1] But the validity of bonds issued by a municipality in aid of a railway in Illinois has been held not to depend upon the keeping of a record showing the authority of the clerk to give notice calling an election for the purpose of determining their issue, or to preserve a record of the notice of election. The rights of bondholders do not depend upon the performance of such duties by the town clerk, but upon whether there has been in fact a substantial compliance with the requirements of the law authorizing an election to be held.[2]

§ 202. **The rule in New Jersey.**—In New Jersey, where the statute requires that no debt shall be contracted or bonds issued by a town, until the written consent of a majority of the tax-payers has been obtained and filed in the office of the county clerk, it was held in an action upon certain bonds that the declaration must allege that these conditions had been complied with to sustain the validity of the bonds.[3]

§ 203. **The rule in Vermont.**—In Vermont an act required the assents of the tax-payers to aid a railroad company to be obtained, and a certificate of the railroad commissioners, appended thereto, to be filed in the office of the town clerk and duly recorded. The act also required that a copy should be filed and recorded in the office of the county clerk before the commissioners were authorized to make the subscription and issue the bonds. The paper was only filed in the office of the town clerk, but was not recorded. A direct proceeding in mandamus was brought to compel the officers to issue bonds, and the writ was denied. The court made a distinction between this paper and a deed. In the case of the deed the contract is valid between the parties without recording, the object of the record is merely to give notice; on the other hand, the assent

[1] People *v.* Oldtown, 88 Ill. 202.
[2] Jacksonville, etc., R. R. Co. *v.* Town of Virden, 104 Ill. 339.
[3] Morrison *v.* Inhabitants, 36 N. J. L. 219.

of the tax-payers and the certificate of the railroad commissioners is a condition precedent, and until such conditions are complied with there was no power to make a valid contract.[1]

§ 204. **Decisions of the supreme court of the United States.** —The subject under consideration, that is, the assent of voters or tax-payers as a condition precedent to the issuance of bonds, has been considered and discussed by the supreme court of the United States in a number of important cases. The decisions of the New York courts are in conflict with the rulings of the supreme court of the United States on this question. A case arose in the supreme court from New York, in 1875, involving this question. The opinion was delivered by Mr. Justice Strong, who said: "We have carefully considered the reasons given for the judgments in the New York cases without being convinced by them. They ignore the paramount purpose for which the bonds were authorized by the legislature, and they treat the written assent of the taxables as the authority of the township officers, when in fact, the power was given by the legislature, and it was only left for the town to determine, by the action of two-thirds of the resident taxables whether the supervisors and commissioners might act under the power. In Gould *v.* Sterling, the legislative act required no affidavit to be filed with the statement of the assenting tax-payers; and in Starin *v.* Genoa, the affidavit filed with it was merely verifying that the persons whose names appeared on the assent, comprise two-thirds of all the resident tax-payers. But it is obvious that if no more than this was meant by the required affidavit, it was wholly useless; for the assessment rolls of the township would have shown as much. * * * But assuming that what was ruled in Gould *v.* Sterling and Starin *v.* Genoa is still the doctrine of the New York courts, we find ourselves unable to yield to it our assent. It is against the whole current of our decisions, as well as against the decisions made in other states; and we think it is not supported by the soundest reason."[2]

[1] Essex Co. R. R. Co. *v.* Town of Lunenburgh, 49 Vt. 143.

[2] Town of Venice *v.* Murdock, 92 U. S. 494; Bissell *v.* City of Jefferson-

And again the court said: "It is argued, however, that the New York decisions were the judicial construction of the statutes of that state; and, therefore, that they furnish a rule by which we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction; but they do not. They are not attempts at interpretation. They would apply as well to the execution of powers or authority granted by private persons as they do to the issue of bonds under the statute of April 15, 1852. They assert general principles to wit: That persons empowered to borrow money and give bonds therefor, for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to the company; a doctrine denied by this court, in the supreme court of Pennsylvania and even in the Court of Appeals of New York.[1] They assert, also, that where authority is given to an officer to execute bonds on an assent of two-thirds of the voters of the town, the assent to be obtained by the officer and filed in a public office, with an affidavit verifying the assent, the verification amounts to nothing, subserves no purpose, and that a *bona fide* holder of the bonds is bound to prove that the requisite number of voters did actually assent. They assert this as a general proposition. They do not assert that the statute so declares or that such is even implied. There is, therefore, before us, no such case of the construction of the state statute by state courts which requires us to yield our own convictions to the right and blindly follow the lead of others, eminent, as we freely concede they are."[2]

The supreme court of the United States has also held that bonds of a county in Missouri are not invalid in the hands of an innocent purchaser for value, because the railroad com-

ville, 24 How. 287; Comrs. of Knox Co. *v.* Aspinwell, 21 How. 539; St. Joseph Township *v.* Rogers, 16 Wall. 644; Town of Coloma *v.* Eaves, 92 U. S. 484; Mercer Co. *v.* Hacket, 1 Wall. 83; Soc. for Sav. *v.* City of New London, 29 Conn. 174; Evansville, etc., Railroad Co. *v.* City of Evansville, 15 Ind. 395; Commissioners of Knox Co. *v.* Nichols, 14 Ohio St. 260.

[1] People *v.* Mead, 24 N. Y. 114; Town of Venice *v.* Woodruff, 62 N.Y. 462.

[2] Town of Venice *v.* Murdock, 92 U. S. 494.

pany, to which said bonds were issued in payment for its capital stock, was not created according to law until subsequent to the favorable vote of the qualified voters and their order of subscription. And if assent is given to a specified aid to a railroad named, a perfecting of the corporation before the subscription is made and the bonds issued, is a compliance with the statute.[1]

Where it is conceded that the commissioners to issue town bonds in aid of a railroad were duly appointed; that the issue of bonds was no larger than authorized by statute; and that a paper purporting to contain the names of the requsite number of tax-payers, duly certified, was filed with the county clerk, and that the plaintiffs were *bona fide* holders, the defenses that the consent roll did not in fact contain the requisite number of tax-payers, and that the verifying affidavit was false, and that the commissioners did not borrow money on the bonds, but disposed of them without consideration, are unavailing against such *bona fide* holders. And where the act gave the commissioners power, under certain conditions, to issue the bonds, and the recitals therein show that they were issued, "in pursuance" of the act; and the bonds were all duly registered as required, plaintiff is only bound to show, to entitle him *prima facie* to judgment, the due appointment of the commissioners and the execution by them is fact of the bonds. It is not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were in fact performed before the bonds were issued. The one was presumed from the possession of the bonds and the other was established by the statute authorizing an issue of bonds, and by proof of the due appointment of the commissioners, and their execution of the bonds, with recitals of the compliance with the statutes. Officers appointed, such as commissioners appointed by the circuit court, represent the municipality as fully as officers elected. When the legislature declares how an officer is to be selected, and the officer is selected in ac-

[1] County of Daviess *v.* Huidekoper, 98 U. S. 98.

cordance with the declaration, his acts, within the scope of the powers given him by the legislature bind the municipality.[1]

A petition of tax-payers of a town in New York to the county judge, under the statutes of 1869, as amended in 1871, is not sufficient to authorize the county judge to take jurisdiction and render an adjudication authorizing the town to issue its bonds in the aid of a railroad company, where such petition only alleges that the petitioners, "are a majority of the tax-payers," and represent "a majority of the taxable property" therein. The petition should state, in substance, that the tax-payers petitioning were a majority of the tax-payers of the town, who were taxed or assessed for property, not including those taxed for dogs or highway tax only. The adjudication of the county judge was not sufficient to authorize the town to create and issue its bonds pursuant to said laws of New York which only adjudged that the petitioners represent a majority of the tax-payers and of the taxable property of said town. It was essential, in order to confer authority upon the town to create and issue its bonds, under said laws of 1869 and 1871, that the adjudication or judgment of the county judge should declare, in substance, that the quorum of tax-payers who desired that the town should create and issue its bonds, was one exclusive of tax-payers who are assessed or taxed for dogs or highway tax only. And where a majority of the tax-payers of the town are authorized by statute to incumber the property of all, in the aid of a railroad or other corporation, the record must show that the statutory authority has been pursued.[2]

The supreme court of the United States in passing upon the general railroad law of Missouri declared that it must be construed in subordination to the constitution of the state, which prohibits the legislature from authorizing any town to loan its credit to any corporation unless two-thirds of the qualified voters of the town, at a regular or special election, shall assent thereto The constitution of the state controls the construction of the act of 1868, and prevents the issue of any bonds by

[1] Bernards Tp. *v.* Morrison, 133 U. S. 523.

[2] Rich *v.* Town of Mentz, 134 U. S. 632.

a town of the state without the previous assent of two-thirds of its voters expressed at an election, general or special, called for that purpose.[1]

The supreme court of the United States has also held that when bonds have been issued upon the consent of the city council evidenced by their record, and when for years thereafter interest has been duly paid upon such bonds, the courts will not, after the lapse of twenty years, in a suit on the bonds, pronounce them invalid on the ground that the meeting of the council at which the assent was given was the last of a series of adjourned meetings the first of which was adjourned by the city clerk alone at a meeting when no member of the city council was present.[2]

In a late case from the state of New York the supreme court of the United States further considers this subject in an able opinion by Justice Brewer. The learned court held that the petition of the tax-payers purporting to be a majority and representing a majority of the taxable property of the town to issue bonds of the town to aid in the construction of a railroad, under the New York law of 1869, is not void because the petition was, as to some of the petitioners, conditional on the road being located on a certain route, where the condition had been fulfilled before the filing of the petition, and it gave the county judge jurisdiction. And that the notice of a hearing of a petition by the county judge for town bonds does not specify the place at which the hearing is to be had is not a valid objection, for it will be legally presumed that the place of hearing is in the place of the county judge.[3]

§ 205. **The doctrine in the federal courts.**—The subject of the assent of tax-payers has been considered and passed upon by other of the federal courts. It has been held that the verification of a petition under the statutes of New York of 1869 and 1871 for the issuance of bonds by municipal corporations, to be invested in the stock or bonds of a railroad corporation,

[1] Hill *v.* City of Memphis, 134 U. S. 198.

[2] Atchison Board of Education *v.* Dekay, 148 U. S. 591.

[3] Andes *v.* Ely, 158 U. S. 312.

is a part of such petition, and if such petition and verification, taken together, state the necessary facts required by statute, the county court to whom it is addressed will have jurisdiction. And where a petition and verification in such case uses the words "tax-payers," it will be deemed to include "owners of non-resident lands taxed as such."[1]

Where a petition alleging that the signers are a majority of the tax-payers of a certain town, the court held that the omission after the word "tax-payers" of the words "not including those taxed for dogs or highway tax only," found in the first section of the bonding act, where the legislature has, in the same section, defined the word "tax-payers" to mean a person taxed for real or personal property, "not including those taxed for dogs or highway tax only," did not invalidate the petition by reason of such omission. And it was not necessary to repeat the definition and exclusion each time the word was used. It meant what the act declared it to mean, and no explanation or qualification was nessary.[2]

An act providing for the issue of bonds, and stating that certain parties shall be deemed tax-payers, and others shall not, does not make two classes of tax-payers—it makes one; and a petition alleging that the signers are a majority of the tax-payers of the town is not invalidated by the omission to state the words "not including those taxed for dogs or highway only," notwithstanding such negative clause was used in the act providing for the issue of bonds, and for the reason that, in defining the word "tax-payer," the act expressly excludes persons so taxed.[3]

The statute of New York of 1871 defines the term "tax-payer," when used in this act, to mean such tax-payers as are not assessed for dogs or highway tax only. It was held that this definition did not cure a petition which merely showed the consent of "a majority of tax-payers," where the act explicitly required the approval to appear of "a majority of tax-payers, not including those taxed for dogs or highway tax only."[4]

[1] Whiting *v.* Town of Potter, 2 Fed. R. 517.

[2] Chandler *v.* Town of Atica, 18 Fed. R. 299.

[3] Rich *v.* Town of Mentz, 18 Fed. R. 52.

[4] Rich *v.* Town of Mentz, 19 Fed. R. 725.

And as such statute required the petition to show to the satisfaction of the county judge that the petitioners were a majority of the tax-payers, "not including those taxed for dogs or highway tax only," it was held that municipal bonds issued under the act were void unless the record shows that the county judge was satisfied of the sufficiency of the petition.[1]

Sufficiency and Regularity of Elections.

§ 206. **The terms "majority of the legal voters," "two-thirds of the qualified voters," "qualified electors," etc., construed.**—In Missouri, under a law which empowered the city authorities of St. Louis to grant permission for the opening and establishment for the sale of refreshments on any day of the week, "whenever a majority of the legal voters of the city" authorized them to do so, it was held that there must be a majority of the voters participating in the election at which the vote was taken, and not merely a majority of those voting upon that particular question. The judge who delivered the opinion of the court used the following language: "The act expressly requires a majority of the legal voters, that is, of all the legal voters of the city, and not merely all those who at a particular time chose to vote upon the question."[2]

In 1866 a similar question was before the supreme court of that state for consideration. There it was provided that the mayor and council of St. Joseph should cause all propositions "to create a debt by borrowing money" to be submitted "to a vote of the qualified voters of the city. And that in all such cases it should require 'two-thirds of such qualified voters' to sanction the same." A proposition to borrow money for the improvement of streets was submitted to a vote of the voters at an election called for that purpose, and resulted in a majority in favor of the measure. The mayor declined signing the necessary bond, because he was in doubt whether the matter was to be determined by two-thirds of all the voters polled at the

[1] Rich *v.* Town of Mentz, 19 Fed. R. 725; Cowdrey *v.* Town of Canadea, 16 Fed. R. 532.

[2] State *v.* Winkelmeier, 35 Mo. 103.

special election, or by two-thirds of all the voters resident in the city, absolutely, whether voting or not. Thereupon a suit was instituted to settle this question, and to compel the mayor, by mandamus, to issue the bonds. In giving its decision, the court said: "We think it was sufficient that two-thirds of all the qualified voters who voted at the special election authorized for the express purpose of determining that question, on public notice duly given, voted in favor of the proposition. This was the mode provided by law for ascertaining the sense of the qualified voters of the city upon that question. There would appear to be no other practical way in which the matter could be determined." The writ of mandamus was accordingly issued.[1]

The same year the question came up again in the case of State *v.* Binder, 38 Mo. 450. In that case the point arose under the "refreshment act" of St. Louis, which was considered in the case of the State *v.* Winkelmeier. It appeared that the authority to grant the permission in question was given at a special election called for that purpose, and that out of a vote of seven thousand and eighty-five, five thousand and fifty-two were in favor of the grant and two thousand and thirty-four against it. The cases of State *v.* Winkelmeier and State *v.* St. Joseph were referred to; and after quoting from the opinion in the latter case, the court said: "We think the case made here comes within the reasoning and principles of that decision, namely: That an election of this kind, authorized for the purpose of determining that question on public notice duly given, was the mode contemplated by the legislature, as well as by the law, for ascertaining the sense of the legal voters upon the question submitted, and that there could not well be any other practical way in which such a matter could be determined."[2]

The supreme court of the United States in construing these terms has followed the rule laid down by the Missouri courts. This is an established rule as to the effect of elections in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called

[1] State *v.* Mayor of St. Joseph, 37 Mo. 270.

[2] State *v.* Binder, 38 Mo. 450. But see State *v.* Harris, 96 Mo. 29.

are presumed to assent to the expressed will of the majority of those voting, unless the law authorizing the election otherwise declared. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted unless the legislative will to that effect is clearly expressed.[1]

The supreme court of the United States, in construing an Illinois municipal aid statute, in an opinion delivered by Mr. Justice Clifford, held that by the phrase "a majority of the legal voters of a township" was intended to require only a majority of the legal voters of the township voting at an election to ascertain whether the proposition to subscribe for the stock of the company should be accepted or rejected ; that such is the true meaning of the enactment, as the question would necessarily be determined by a count of the ballots.[2]

In 1883 a case arose in the supreme court of the United States from the state of Mississippi, involving the same question upon a construction of a provision of the constitution of that state, which was identical to that of the constitution of Missouri, and the courts held that the clause in the constitution of Mississippi requiring the assent of two-thirds of the qualified voters of the county at an election lawfully held for that purpose, to a proposed issue of municipal bonds, means the vote of two-thirds of the qualified voters present and voting at such election in its favor, as determined by the official return of the result. The words "qualified voters" as used in the constitution of Mississippi, must be taken to mean not those qualified and entitled to vote, but those qualified and actually voting. In that connection the voter is one who votes ; not one who, although qualified to vote, does not vote.[3]

The constitution of Minnesota declares that "all laws for removing county seats shall, before taking effect, be submitted

[1] County of Cass *v.* Johnston, 95 U. S. 360; County of Cass *v.* Jordan, 95 U. S. 373; Louisville, etc., Railroad Co. *v.* County of Davidson, 1 Sneed 638; Taylor *v.* Taylor, 10 Minn. 107; People *v.* Warfield, 20 Ill. 159; People *v.* Garner, 47 Ill. 246; People *v.* Wiant, 48 Ill. 263; 2 Elliott R. R., § 849.

[2] St. Joseph Tp. *v.* Rogers, 16 Wall. 644.

[3] Carroll Co. *v.* Smith, 111 U. S. 556; St. Joseph *v.* Rogers. 16 Wall. 644; County of Cass *v.* Johnston, 95 U. S. 360.

to the election of the county or counties to be affected thereby, at the general election after the passage thereof, and be adopted by a majority of such electors." The supreme court of Minnesota, in construing this provision of the constitution held that the words, "a majority of such electors" means a majority of the electors voting at the election.[1]

The constitution of Indiana contains a provision that "it shall be the duty of the general assembly to submit any proposed amendment to the constitution" to the electors of the state, and if a majority of said electors shall ratify the same," it "shall become a part of this constitution." The supreme court of Indiana, in construing this provision, held that it required a majority of the electors of the state, but that the general assembly might provide that a majority of the whole number of votes cast at the election should be sufficient.[2]

In Tennessee, it has been held that where the question of the subscription to the stock of a railroad company is submitted to the people and made to depend upon a majority of the voters of the county or municipality, the only proper test of the number entitled to vote at such election is the ballot-box or the roll at the last preceding election.[3]

In North Carolina a special statute which authorized a town to issue bonds for school purposes and to levy a tax to pay the same, when "a majority of those who voted therefor" should authorize the same, was held unconstitutional, as the constitution requires a majority of all the qualified voters.[4]

In Illinois when a petition for an election to determine whether a township should subscribe to the capital stock of a railroad company, clearly showed that the signers intended to have the subscription if any, under the act of 1869, and where the notice of election referred to such petition, it was held that a majority of all the voters residing in the township must vote for the proposition.[5]

[1] Taylor *v.* Taylor, 10 Minn, 107; Everett *v.* Smith, 22 Minn. 53.

[2] State *v.* Swift, 69 Ind. 505.

[3] Louisville, etc., R. R. Co. *v.* County of Davidson, 1 Sneed, 638. But see Citizens', etc., Assn. *v.* Perry County, 156 U. S. 692.

[4] Duke *v.* Brown, 96 N. Car. 127; McDowell *v.* Massachusetts, etc., Co., 96 N. Car. 514, 2 S. E. R. 351.

[5] People *v.* Chapman, 66 Ill. 137.

The New Jersey statute, which requires "the consent of a majority of the tax-payers appearing upon the last assessment roll, as shall represent a majority of the landed property of the township," requires the consent of a majority of all the tax-payers and a majority which will also represent a majority of the real estate.[1]

The supreme court of the United states has held that the significance of the words "people of the town" and "inhabitants of the town" in the Illinois act of 1869, authorizing municipal aid to railroads, is the same. Inhabitants, in such case, means legal voters.[2]

§ 207. **Irregularity in the vote may be remedied.**—The supreme court of the United States has held that where any mere irregularity in taking the votes of the electors, or otherwise, in issuing municipal bonds occurs or exists, it may be remedied by appropriate legislation.[3] But acts in violation of the constitution, which the legislature could not authorize in the first instance, can not be thus cured,[4] and it has even been held that mere irregularities may prevent legislative ratification.[5]

§ 208. **Irregularities in the form of notice, ballot, etc., do not invalidate bonds.**—The supreme court of Illinois has held that bonds issued in the exercise of a power constitutionally conferred, are binding upon the municipality, although some irregularities in the form of notice of election, want of the precise words on the ballot, or others of like character may have occurred.[6]

The same doctrine has been announced by the supreme court of the United States in which this case was considered by that court.[7]

[1] Lane *v.* Schomp, 20 N. J. Eq. 82.

[2] Walnut *v.* Wade, 103 U. S. 683.

[3] Gelpcke *v.* City of Dubuque, 1 Wall. 158. See, also, Town of Duanesburgh *v.* Jenkins, 57 N. Y. 177; Hall *v.* Baker, 74 Wis. 118, 42 N. W. R. 104.

[4] 2 Elliott R. R. §§ 844, 862.

[5] Columbus, etc., R. Co. *v.* Board, 65 Ind. 427. This decision, however, seems to be questionable. See, however, Williams *v.* Roberts, 88 Ill. 11.

[6] Burr *v.* City of Carbondale, 76 Ill. 455.

[7] Township of Roberts *v.* Bolles, 101 U. S. 119, were formal defects in the

§ 209. **Substantial compliance with the constitution is sufficient.**—An election to authorize subscription to railroad stock is not invalid, under the Kansas act of 1865, because the election was held before the actual location of the road, and where the proposition submitted contained only a general description of the route and termini of the road it was held to be sufficient.[1]

So it has been held that, under the Kansas statutes of 1865, it was not necessary to name any particular company in the submission of a proposition to issue bonds to the popular vote. It was sufficient if it was described without naming it.[2]

The Tennessee law does not require that there shall be a final and definite survey and location of the road, nor an estimate of the quantity of grading, before an election is held to decide whether or not the county should subscribe for the stock for which the bonds were issued.[3]

§ 210. **Effect of transposing words in corporate name.**—In a petition for a notice of election the transposition of two words of the corporate names can not render the election invalid and void so as to affect the bonds issued thereunder.[4]

§ 211. **Bonds voted under an unconstitutional statute can not be held valid under general statutes of the state.**—Bonds voted for the purpose of erecting a school-house, under an unconstitutional statute in the state of Nebraska, can not be held valid under the powers conferred on school districts by the general statutes of the state. Mr. Justice Miller in delivering

notice which are immaterial ought not to be held to render the election ineffective. Phillips *v.* Town of Albany, 28 Wis. 340; Belfast, etc., R. Co. *v.* Brooks, 60 Me. 568; Ninth Nat. Bank *v.* Knox County, 37 Fed. R. 75. So, in some cases, there may be an estoppel, and, in some jurisdictions, the decision of the proper local officers as to the sufficiency of the notice, where some notice is given, would be regarded as conclusive as against a collateral attack. 2 Elliott R. R. §§ 859, 865.

[1] Comrs. of Johnson Co. *v.* Thayer, 94 U. S. 631. See, also, Yarish *v.* Cedar Rapids, etc., R. Co., 72 Iowa 556, 34 N. W. R. 417.

[2] Block *v.* Commissioners, 99 U. S. 686. See, also, Ninth Nat. Bank *v.* Knox County, 37 Fed. R. 75.

[3] County of Wilson *v.* National Bank, 13 U. S. 770.

[4] County of Moultrie *v.* Fairfield, 105 U. S. 370.

the opinion of the supreme court of the United States upon this question said: "We are asked, however, to affirm the judgment because the bonds may be held valid under the powers conferred on school districts by the general statutes. We are, however, of a different opinion. The general statute had other conditions for creating a debt than the special act mentioned on the face of these bonds. This statute provided a fund which might of itself be sufficient to pay the debt without resort to taxation. The vote of the electors might not have been obtained under the general statute. And as the bonds recite that they were issued under this act, and that the vote was taken under it, we can not see that power purposed to be exercised under other and very different circumstances, can be invoked to give validity to an act which is void by the authority under which they professed to be acting."[1]

§ 212. **Mode of holding election.**—A vote in favor of a subscription in aid of a railroad, but not mentioning the subject of issuing bonds in payment thereof, can not authorize the issue of bonds by a township in Illinois, after the constitution of 1870 was subsequently adopted prohibiting such subscription.[2]

An election to authorize the issue of bonds in a town in Illinois, required to be held and conducted and return thereof made as required by law, may be held after the manner of an election for town officers, and not of a general election.[3]

And it has been held that where the act authorizing the issuance of aid bonds fails to provide for the manner of holding an election it may be conducted under the existing laws relating to the borrowing of money by municipalities.[4]

Notice.

§ 213. **The doctrine of the supreme court of the United States.**—A case arose in the supreme court of the United

[1] School District *v.* Ins. Co., 103 U. S. 707.

[2] Concord *v.* Robinson, 121 U. S. 165.

[3] Oregon *v.* Jennings, 119 U. S. 74.

[4] Union Bank *v.* Board, 116 N. Car. 339, 21 S. E. R. 410. In another case authority to hold a special election was implied. Cedar Rapids, etc., Co., *v.* Boone County, 34 Iowa 45.

States in 1875, from Kansas, where certain municipal bonds had been issued under legislative authority, requiring a popular vote at an election of which thirty days' notice was to be given, and which contained a recital to the effect that they were "issued in pursuance of and in accordance with the act of the legislature," stating the law which authorized the issuance of the bonds. The court held that the bonds were valid in the hands of a *bona fide* holder for value, before due, without notice, although the election was held within less than thirty days after the date of the order providing for it; that the board of county commissioners who caused the bonds to be issued were constituted authority to determine whether the conditions of fact, made by the statute precedent to the exercise of the authority granted to execute and issue the bonds, has been performed, and their recital in the bonds issued by them is conclusive in a suit against the township brought by a *bona fide* holder.[1]

In construing the same statute the supreme court declared that the election was a step in the process of the execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription, and consequent bond issue, were questions which the law submitted to the board of county commissioners, and which it was necessary for them to enter before they could act. The board passed upon them and issued the bonds, asserting by the recitals that they were issued "in pursuance of and in accordance with the act of the legislature." Thus the plaintiff below took them without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board that the bonds had been issued in accordance with the law. In his hands, therefore, they were valid instruments.[2]

[1] Humboldt Tp. *v.* Long, 92 U. S. 642.

[2] Marcy *v.* Township of Oswego, 92 U. S. 637; Humboldt Tp. *v.* Long, 92

A municipality must have legislative authority to subscribe to the capital stock of a bridge company before its officers can bind the body politic to the payment of bonds purporting to be issued on that account. Municipal officers can not rightfully dispense with any of the essential proceedings which the legislature has prescribed for the purpose of investing them with power to act in the matter of such a subscription. If they do, the bonds they issue will be invalid in the hands of all who can not claim protection as *bona fide* holders. To be a *bona fide* holder one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and all its requirements. And where the law provides that a statute authorizing the issue of municipal bonds should not take effect until after its publication in a certain paper, the law charges the purchaser with knowledge of the time when the statute went into effect. Where the bonds sued upon carry on their face unmistakable evidence that the forms of the law under which they purport to have been issued have not been complied with, they are void. Thus, under a statute passed by the legislature of Kansas, certain bonds were issued, and the act under which the bonds were issued was recited in the bonds. The act was passed and approved March 1, 1872, but was not, by its terms, to go into effect until after its publication in the "Kansas Weekly Commonwealth." Of this every purchaser of the bonds had notice, because it was part of the statute he was bound to take notice of. A purchaser would, therefore, be put upon inquiry as to the time of publication, and by reasonable diligence could have ascertained that this did not take place until March 21. This being the case, the law charges him with the knowledge that the statute did not go into effect until that date. The statute further provided that no bonds could be issued under its authority until the question or issue had

U. S. 642. See, also, Board, etc., of Madison County *v.* Brown, 67 Miss. 684.

been submitted to the legal voters of the town at an election, of which thirty days' notice had been given, and at which a majority of the votes should be in favor of the measure. These bonds bore date April 15, 1872, and, pursuant to the express requirements of the act, contained a statement of the purpose for which they were issued, a reference to the act under which they were issued, and the result of the vote of the inhabitants on the question of their issuance, which was stated to have been taken April 8, 1872. No valid notice of an election could be given until the act went into effect, because until then no officer of the township had authority to designate the time or place of holding it. These bonds, therefore, carried upon their face unmistakable evidence that the forms of law under which they purported to have been issued had not been complied with, because thirty days had not elapsed between the time the law took effect and the date of the election.[1]

Bonds issued by a municipality under legislative authority, and in payment of its subscription to the stock of a railroad company, after a majority of the voters of the county had at an election voted in favor of subscribing for the stock and issuing the bonds, recited, on their face, the wrong statute, but also stated that they were issued "in pursuance to a vote of the electors of the municipality of September 13, 1869." The statute in force required that at least thirty days' notice of the election should be given, and made it the duty of the board of county commissioners to subscribe for the stock and issue the bonds, after such assent of the majority of the voters had been given. In a suit against the board on coupons due on the bonds, brought by a *bona fide* holder of them, it appeared, by record evidence, that the board made an order for an election thirty-three days before it was held, and had canvassed the returns and certified that there was a majority of the voters in favor of the proposition, and had made such vote the basis of their action in subscribing for the stock and issuing the bonds

McClure *v.* Township of Oxford, 94 U. S. 429; George *v.* Township of Oxford, 16 Kan. 72; Town of South Ottawa *v.* Perkins, 94 U. S. 260.

to the company. It was held that the statement in the bonds as to the vote was equivalent to a statement that the vote was one lawful and regular in form, and such as the law then in force required as to prior notice, and that the issue or use of the bonds not having been enjoined for two years and a half, between the day of election and the time the company parted with the bonds for value, and the county having for ten years paid the interest annually on the bonds, it was estopped as against the plaintiff from defending on the ground of improper notice of the election. Evidence by the defendant to show less than thirty days' notice of the election could not avail. The case was within the rule laid down in Coloma *v.* Eaves, which declares that where legislative authority has been given to a municipality or its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as the popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipalities were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.[1]

So, where the law required twenty-four days' notice, and a petition signed by twenty persons, bonds issued upon a petition signed by twelve persons upon ten days' notice were held good in the hands of *bona fide* holders.[2]

§ 214. **Rulings of the state courts.**—Where a county had, by the legislative act, no authority to issue its bonds to a railroad company, unless upon the sanction of a previous vote, after thirty days' notice to be held for that purpose, the supreme court of Illinois held, in a direct proceeding against the county to enjoin it from issuing its bonds, that although there was an election at which a majority voted in favor of the sub-

[1] Town of Coloma *v.* Eaves, 92 U. S. 113 U. S. 227; Dixon Co. *v.* Field, 484; Anderson Co. Comrs. *v.* Beal, 111 U. S. 83.

[2] Roberts *v.* Bolles, 101 U. S. 119.

scription, the failure to give the thirty days' notice was a fatal defect, and the issue of the bonds was, therefore, enjoined. The opinion of the court was delivered by Mr. Justice Thornton, who declared that such municipalities were not created with a view to engage in commerce, or to aid in the construction of railways, but for governmental purposes only. When they exercise the functions given by the statute under consideration, the powers granted must not only be clearly conferred but strictly pursued. If the mode prescribed for carrying into effect the right to issue bonds is not complied with in all material matters, then the bonds should not be issued, and thus the tax-payer will be exempt from the imposition of illegal taxes and a grievous burden upon his property. These principles have been so lavishly discussed and fully settled by this court that we need only refer to some of the cases.[1]

When the notice of an election is given to vote on the proposition for aid to a railroad, the vote must be taken on the proposition named in the notice. Thus, a notice was given for the proper time and the proposition specified. One week before the election the proposition named in the notice was modified, and the publication continued as modified. The publication of the modified publication was for one week less than was required by the statute. In a direct proceeding to enjoin the issuance of the bonds, the supreme court of Colorado held that there was no power to issue bonds under such circumstances, therefore their issue was restrained.[2]

So, it has been held that an election can be called only by

[1] Harding *v.* Rockford, etc., R. R. Co., 65 Ill. 90 (1873); The People *v.* County of Tazewell, 22 Ill. 147; Supervisors *v.* The Mississippi and Wabash R. R. Co., 21 Ill. 338; Town of Middleport *v.* Ætna Life Ins. Co., 82 Ill. 562; People *v.* Logan Co., 63 Ill. 374; Williams *v.* Roberts, 88 Ill. 11; People v. Oldtown, 88 Ill. 202; Clarke *v.* Board, etc., 27 Ill. 305; Force *v.* Town of Batavia, 61 Ill. 99; Harding *v.* R., R. I. & St. L. R. R. Co., 65 Ill. 90; Lippincott *v.* Town of Pana, 92 Ill. 24; Gaddis *v.* Richland Co., 92 Ill. 119; Board of Supervisors of Schuyler Co. *v.* The People, 25 Ill. 181; Clarke *v.* Board of Supervisors of Hancock Co., 27 Ill. 305; Marshall Co. *v.* Cook, 38 Ill. 44; Wiley *v.* The Town of Brimfield, 59 Ill. 306; People *v.* Cass Co., 77 Ill. 438 (1875). See, also, Williams *v.* People, 132 Ill. 574.

[2] Packard *v.* Board, etc., 2 Colo. 338. See, also, Kansas City, etc. R. Co. *v.* Rich Tp., 45 Kan. 275, 25 Pac. R. 595.

the officers designated by the law, and hence an election ordered by any other person or body is void, and all acts growing out of it or performed under it are also void. Bonds issued in pursuance of such an election are invalid, and the collection of taxes levied for their payment will be enjoined in a proper action.[1]

The supreme court of Wisconsin has held, however, that a court of equity will not cancel the bonds of a town at the instance of a tax-payer for a mere technical irregularity in calling the town-meeting which directed their issue.[2]

So where the notice is required to be given by the supervisor of the town it may be by an order of the board signed by their clerk. And although the notice is required to be posted by the town clerk or supervisors, they may authorize others to do it.[3]

The courts of Maine have held that it is sufficient if the notice give, with reasonable certainty, information of the subject matter to be acted upon. Thus, an article in the warrant for a town meeting "to see if the town will loan its credit to aid in the construction" of a railroad, was held to be sufficient.[4]

But the courts in Georgia have held that a notice which did not state the amount of the bonds, the rate of interest nor the time nor place of payment, but merely gave notice of the time of the election and the object of the bonds, was insufficient to authorize the issue of the bonds.[5]

Conditions and Limitations as to the Location and Completion of Railroads.

§ 215. **The doctrine of the supreme court of the United States.**—Municipal corporations have no power to issue bonds

[1] Jacksonville, etc., R. Co. *v.* Virden, 104 Ill. 339; Supervisors *v.* Schenck, 5 Wall. 772. But see Young *v.* Webster City, etc., Co., 75 Iowa 140.

[2] Sauerhering *v.* Iron Ridge Co., 25 Wis. 447.

[3] Lawson *v.* Milwaukee, etc., R. R. Co., 30 Wis. 597; Phillips *v.* Town of Albany, 28 Wis. 340. See, also, Young *v.* Webster City, etc., Co., 75 Iowa 140.

[4] Belfast, etc., R. R. Co. *v.* Inhabitants of Brooks, 60 Me. 568.

[5] Bowen *v.* Mayor, etc., Co., of Greensboro, 79 Ga. 709. See, also, Cook *v.* City of Beatrice, 32 Neb. 80, 48 N. W. R. 828.

in aid of a railroad except by legislative permission; the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such condition as it may choose. And where the legislature of a state, in authorizing a municipality to subscribe for a stock in a railroad company and to pay for the same by an issue of bonds, prescribes that said bonds should not extend beyond ten years from the date of issuance, such limitation is a restriction on the power to issue bonds.[1]

In order to authorize the issue of bonds in aid of a railroad, it is not essential that the act should designate by name the county or counties through which the road is to be located, if the route is designated so as to require the road to run through certain points, as termini and along the route; and in running through these points it may include or omit certain counties. When the company locates the route through the county of A, and its bonds are issued, under the provisions of the act which declare "that it shall be lawful for the county court of any county in which any part of the route of the railroad may be to subscribe stock and issue bonds," the bonds issued are valid; the county of A being one of the possible sites, and a site ultimately occupied in fact.[2]

In a subsequent case this doctrine was reaffirmed. The proposition was to be first submitted to the electors, and the aid was to be given "by the commissioners of any county into, through or near which any railroad is or may be located." The proposition submitted was for aid in constructing a railroad commencing at or near Union Depot, on the south side of and near the mouth of the Kansas river, and near Kansas City; thence to Olathe, Johnson county; thence in a southerly direction, through said county to the southern boundary of the state of Kansas. The road was located through Johnson county and the work commenced before the bonds were issued. The court was of the opinion that the failure to give the name of the railroad in the submission was not a defect in the proceedings. But if it were a defect it was a mere irregularity, which did

[1] Barnum *v.* Okolona, 148 U. S. 393. [2] County of Callaway *v.* Foster, 93 U. S. 567.

not go to the question of jurisdiction of the county commissioners to act, and did not impair the validity of the bonds.[1]

§ 216. **The rule in the federal courts.**—A common condition precedent is that the railroad shall be constructed within a certain time, or located at a certain place or over a certain route, or that its termini shall be established at certain points. Thus, under a state law authorizing towns, cities and villages to issue bonds in aid of railroads or branch railroads passing through the county in which such towns, cities or villages are situated, where the resolution of the railroad company merely fixed the eastern point, but fixed no location, no counties through which the branch should pass, and no western terminus, it was held to be no location of a branch through a county not designated, and was wholly insufficient to authorize the issuing of any bonds by a town in such county. There was no authority to issue the bonds until the whole extension or branch was located.[2]

And where, by state law, towns, cities and villages along the lines of certain railroads, or interested in the construction thereof, in any county through which they passed, were authorized to issue bonds in aid thereof, it was held that the power to so issue bonds was confined to the town in any county, or near which such railroad or its branches may be located.[3]

§ 217. **Municipal aid bonds, how affected by a change of route.**—After a city had voted a donation of bonds, an act was passed authorizing the railroad company to consolidate with another company, and directing the bonds to be delivered to the new company. In an action on the bonds thus delivered it was contended that the consolidation act authorized a change of route which would leave the city off the line of the road; but it appeared that the road was actually built through the city,

[1] Commissioners, etc., *v.* Thayer, 94 U. S. 631.

[2] Mellen *v.* Town of Lansing, 11 Fed. R. 829. See, also, Purdy *v.* Town of Lansing, 128 U. S. 557.

[3] Mellen *v.* Town of Lansing, 11 Fed. R. 820; Thomas *v.* Town of Lansing, 14 Fed. R. 618.

according to the condition of the subscription. It was held that the giving of an option to change the route did not affect the validity of the bonds, and that they were properly delivered to the consolidated company.[1]

The laws of Alabama of 1868 authorized railroads to consolidate on certain conditions. The act provided for the transfer of all the property and choses in action of each constituent company to the consolidated company. The laws of Mississippi of 1871 granted the Columbus, Fayette and Decatur Railroad Company all the privileges, rights and immunities conferred by the Alabama act. The laws of Mississippi of 1882 authorized the bonds which were payable to the Columbus, Fayette and Decatur Railroad Company to be delivered to the consolidated company under the same limitations and restrictions under which they would have become payable to such payee. The laws of Mississippi of 1872 required the city authorities to issue the bonds only when the terms of subscription were complied with. It was held that such city, in an action by an innocent holder of such bonds on over-due interest coupons, could not set up as a defense that the consolidated company was authorized to build a different road from the one originally chartered, and to leave such city off its line entirely.[2]

§ 218. **The doctrine in Kansas.**—In Kansas, where the issuing of township bonds or warrants to a railroad company is dependent upon the condition that the company shall build or cause to be built, and have in operation, with cars running thereon, by lease or otherwise, its railroad from a certain city therein named, at or near the depot of another railroad company in the city, the supreme court of that state held that the building of its road within one hundred and eleven and one-half feet of the limits of the city and an arrangement by it with the other railroad company, whose road it intersected at that point, for the running of its trains over the road from its inter-

[1] Mayor, etc., *v.* Denison, 69 Fed. R. 59. See, also, Cantillon *v.* Dubuque, etc., R. Co., 78 Iowa 48.

[2] Denison *v.* City of Columbus, 62 Fed. R. 775.

section to its depot within the city, and the operation of the road from the depot in the city, over its entire line, would be regarded as a substantial compliance with the conditions.[1]

So, a condition in a vote of bonds that the railroad company should establish and maintain a division terminus at a point situated between two named cities was held to be complied with where the terminus was established at a point on the line of the road between the two cities a few rods off from a direct line between them.[2]

A county had voted aid to a railroad company in payment of its subscription to its capital stock, upon the condition, among others, that the railroad company should receive the bonds when its road was "built of standard gauge, and completed as first class, and in operation by lease or otherwise." It was held that to entitle the railroad company to receive the bonds of the county, its road, if constructed according to the terms of the contract, need not have been perfect in every respect at the prescribed date for its completion, but it should have been completed and in operation at that date, in such a manner that it might be properly and regularly used for the purpose of transporting freight and passengers.[3]

The fact that a portion of the act providing for a certain disposition of taxes levied upon the railroad property, is unconstitutional, does not necessarily invalidate the other portions of the statute, or render the entire proceedings a nullity, or prevent the county commissioners from subscribing to the stock and issuing the bonds.[4]

§ 219. **The rule in Nebraska.**—In Nebraska a number of persons who signed a petition for the calling of an election to vote the issue of bonds by a certain township in aid of a railroad, as authorized by the laws of that state, were induced to

[1] Chicago, etc., R. R. Co. *v.* Makepeace, 44 Kan. 676, 24 Pac. R. 1104.

[2] Chicago, etc., R. R. Co. *v.* Harris (Kan.), 30 Pac. R. 456.

[3] Southern Kansas & Panhandle R. R. Co. *v.* Towner, 41 Kan. 72; Brocaw *v.* Board, etc., 73 Ind. 543; Freeman *v.* Matlock, 67 Ind. 99; Lamb *v.* Anderson, 54 Ia. 190; Railroad Company *v.* Thompson, 24 Kan. 170; Winter *v.* Muscogee Railroad Co., 11 Ga. 438.

[4] Turner *v.* Comrs. of Woodson Co., 27 Kan. 314.

sign such petition upon the representation on behalf of the railroad company that the road would locate a depot on a certain section of land designated in the petition. Subsequently it was voted that the bonds be issued and the depot was located on an adjoining section. The petition stated that the depot should be located on section sixteen. After it was voted that the bonds should be issued the depot was located on section seventeen. It was held that the aggrieved petitioners were entitled to have the issue of the bonds enjoined on the ground of false representation.[1]

Where the precinct bonds of a railroad company provided that they should be issued "when said road shall be graded, tied and ironed, and completed ready for the running of trains, and trains running thereon, etc., on or before the first day of January, 1880," it was held that the company, on compliance with these conditions within the time specified, was entitled to the bonds.[2]

§ 220. **The doctrine in Minnesota.**—In Minnesota under the laws of 1869, it was held that the bonds need not be issued before the completion of the work. The act clearly contemplates that the road is to be built after the determination of the question as to the issue of the bonds by the decision of the council and ratification by the people. The formal execution and delivery and disposal of the bonds which constitute the evidences of such indebtedness were comparatively unimportant matters that might very properly be left, as they were by the act, subject to the future agreement between the company and the council.[3]

A condition precedent to the issue of bonds that a railway company shall, before a certain specified time, "have completed, ironed, and equipped its line of road from the village of W. to the city of M. and have the same in operation for the transportation of passengers and freight," has been held to be

[1] Wullenbaher *v.* Dunigan, 30 Neb. 377, 47 N. W. Rep. 420.

[2] Townsend *v.* Lamb, 14 Neb. 324; State, etc., *v.* Nodaway Co., 48 Mo. 339; Chamberlain *v.* The Painesville, etc., Railroad, 15 Ohio St. 225.

[3] Warsop *v.* City of Hastings, 22 Minn. 437; State *v.* City of Lake City, 25 Minn. 404.

substantially complied with by so constructing a road within a quarter of a mile of the village of W. and from that point entering the town on another road and using its depot.[1]

A city voted to issue bonds in aid of a railroad provided the terminus, general offices and headquarters should be located in said city. The supreme court held that the location of the operating headquarters of the road must be established there before the city would be compelled by mandamus to issue the bonds.[2]

§ 221. **The doctrine in Missouri.**—In Missouri it has been held that when the inhabitants of a township vote a subscription on condition that a railroad shall be built and a depot constructed within a mile of the town, it is no excuse that the non-compliance was at the request of the inhabitants. The power of the voters was exhausted at the polls, and any subsequent action was without authority.[3]

But it has been held that if the time within which the road is to be completed is not made the essence of the contract, the municipality will not be released if it actually received the benefits sought by the subscription in aid of the railroad.[4]

§ 222. **The rule in Illinois.**—In a case in Illinois the location of the road was one of the conditions upon which bonds were to be issued, and the bonds were placed in the hands of a depository to be delivered when the conditions were complied with. The route was located as prescribed in the statute, and upon a certificate of the proper officials as to such location, one-tenth of the bonds were delivered; but subsequently the route was relocated. The issue of the remaining nine-tenths of the bonds was restrained on the ground that the officers were held to be estopped by the first location, which was the condition of the issue of the bonds in the hands of the depository.[5]

[1] State *v.* Town of Clark, 23 Minn. 422; Stockton, etc., R. R. Co. *v.* City of Stockton, 51 Cal. 338; Mo. Pac. R. R. Co. *v.* Tygard, 84 Mo. 263; People *v.* Holden, 82 Ill. 93.

[2] State *v.* Minneapolis, 32 Min. 501.

[3] State *v.* County Ct. of Daviess Co., 64 Mo. 30.

[4] Kansas City R. R. Co. *v.* Alderman, 47 Mo. 359.

[5] Alley *v.* Adams Co., 76 Ill. 101.

The same court has also held that the running of trains over the road of another company for a distance of five miles under a lease which is liable to be terminated on one year's notice, is not a substantial compliance with the law authorizing the aid.[1]

§ 223. **The rule in New York.**—In New York it was held that under the laws of 1871 the whole extension or branch of the road must be located before the bonds of the town could be issued. It is not enough that a location be made through a particular county. So that even though the map filed could be regarded as the location of so much of the western extension as was to pass through Tompkins county, there would be no authority for issuing the bonds until the whole extension of the branch could be located. And the board of directors were required to adopt an entire route as feasible and favorable before the town could issue its bonds in aid thereof.[2]

§ 224. **The rule in Indiana.**—In Indiana a railroad company does not forfeit its right to a township donation by a failure to complete its road within the time prescribed, where the prescribed expenditure has been made within the township limits. Nor can the collection of a special tax to pay the donation be enjoined, unless the county commissioners have declared a forfeiture.[3]

§ 225. **The rule in Pennsylvania.**—In Pennsylvania it has been held that when the authority to subscribe is contained in the charter of the railway company, which also provides that the road shall be completed within a certain time, the right to subscribe does not expire at the expiration of that time, and if the legislature extends the time for completion the authority is also extended.[4]

§ 226. **The rule in Iowa.**—In Iowa it has been held that the suspension of work on a road for nearly four years will not

[1] People *v.* Town of Clayton, 88 Ill. 45.

[2] Mellen *v.* Lansing, 20 Blatchford (U. S.) 278; People *v.* Morgan, 55 N. Y. 587; Mellen *v.* Lansing, 19 Blatchford 512, 11 Fed. R. 820; Thomas *v.* Town of Lansing, 21 Blatchford 119.

[3] Nixon *v.* Campbell, 106 Ind. 47.

[4] Commonwealth *v.* Pittsburg, 41 Pa. St. 278.

necessarily work a forfeiture of municipal aid to the railroad company.[1]

Limitations as to the Amount, Time of Payment and Sale of Bonds.

§ 227. **Limitations upon the amount of bonds voted.**—Among the limitations upon the exercise of the power to issue bonds one not unfrequently provided is that the amount voted or issued shall not exceed a specified proportion of the taxable property of the municipality or such a sum as will require a greater levy of taxes than a specified rate on the taxable property to pay the annual interest on the bonds. Peremptory constitutional provisions that municipalities shall not issue bonds exceeding a specified percentage on the value of the taxable property within the municipality, to be ascertained by the official assessments or valuation for the purpose of taxation, are regarded by the supreme court of the United States, as well as by the state tribunals, as fixing a limit beyond which the power to issue bonds can not be legislatively conferred; and the supreme court holds that if bonds be issued in excess of such limit, they are void in the hands of *bona fide* holders, notwithstanding a recital therein that they are issued under and in pursuance of the constitution of the state, inasmuch as such recitals will not estop the municipality from showing that the bonds were issued in violation of the constitutional limitation.[2]

In the case of Merchants' Bank *v.* Bergan County, bonds were voted to the amount of two hundred and fifty thousand dollars, but the presiding judge and clerk of the county court issued, without power to do so, bonds in excess of that amount. The bonds contained no recital on their face as to

[1] Merrill *v.* Welsher, 50 Iowa 61.

[2] In a previous chapter we have considered and discussed the subject of constitutional limitation upon the power to create indebtedness. Marcy *v.* Township of Oswego, 92 U. S. 637; Humboldt Tp. *v.* Long, 92 U. S. 642; Sherman Co. *v.* Simons, 109 U. S. 735; New Providence *v.* Halsey, 117 U. S. 336; Daviess Co. *v.* Dickinson, 117 U. S. 657; Merchants' Bank *v.* Bergen Co., 115 U. S. 384; 1 Dillon on Munic. Corp., §§ 527 and 329a.

the act under which they were issued. But each bond had a certificate thereon signed by the county judge only that it was issued as authorized by the statute (naming it) and by order of the county court in pursuance thereof. It was held that the bonds in excess of the two hundred and fifty thousand dollars were void even in the hands of *bona fide* holders for value, for want of power to issue them, and that the county was not estopped; that the bonds to the amount of two hundred and fifty thousand dollars which were valid were the bonds which were first delivered.[1]

The supreme court of Nebraska has held that where the constitution limits the amount of bonds which may be issued, the vote to issue bonds in excess of such constitutional limit confers no power to issue bonds. It does not operate to entitle the railroad company to the amount which might have been legally issued.[2]

§ 228. **Illustrations of this subject.**—A case arose in the supreme court of the United States from the eastern district of Arkansas involving the construction of the statute of that state authorizing counties to subscribe stock in aid of railroads under such limitations and restrictions, and upon such conditions, as the county court may require, and the president and directors of such company may approve, provided that the amount of such subscription shall not exceed one hundred thousand dollars, and the consent of the inhabitants of such county to such subscription shall be first obtained. Then the act prescribes the manner in which the bonds are to be issued. Under this act a county subscribed a hundred thousand dollars for the stock of a certain railroad company and one hundred thousand dollars to the stock of another railroad company, both subscriptions being made by virtue of a single election being held in that county for that purpose. Bonds were issued for the amount of each subscription of one hundred thousand dollars, aggregating two hundred thousand dollars. Suit was

[1] Buchanan *v.* Litchfield, 102 U. S. 278; Dixon Co. *v.* Field, 111 U. S. 83; Chaffee Co. *v.* Potter, 142 U. S. 355; Hedges *v.* Dixon Co., 150 U. S. 182.

[2] Reineman *v.* Covington R. R. Co., 7 Neb. 310.

brought to recover the amount of certain coupons, some of which were attached to bonds issued to one of the railroad companies and some of which were attached to those issued to the other company. The complaint alleged that the plaintiff was the purchaser and *bona fide* holder of the coupons for value. The county put in a plea setting up the fact of the single election in reference to both subscriptions, and the amount of stock subscribed and bonds issued for each road. This plea being demurred to, the question was raised, whether the two subscriptions, amounting in the aggregate to two hundred thousand dollars, were *ultra vires* of the county under the proviso that the amount of such subscription shall not exceed a hundred thousand dollars. The circuit court of the United States for the eastern district of Arkansas sustained the demurrer and gave judgment to the plaintiff, thus upholding the validity of the bonds. The case was appealed to the supreme court of the United States, and the judgment of the lower court was affirmed. The opinion of the court was delivered by Mr. Justice Bradley, who said: "We do not well see how a different decision could have been made. The state did not restrict the county to a single subscription. The language is: 'Any county in this state may subscribe to the stock of any railroad in this state, * * * and may issue bonds for the amount, etc., provided that the amount of such subscription shall not exceed a hundred thousand dollars.' That is, the power to subscribe is general, but no subscription shall exceed one hundred thousand dollars. The meaning might have been more distinctly expressed by using the plural, 'any railroads,' and making the proviso to read, 'the amount of such subscription shall not exceed a hundred thousand dollars to any one railroad;' but the same sense is sufficiently indicated by the words actually employed. The power given is a power given to subscribe to any railroad. This includes all railroads in the state, without restriction. A subscription to one does not extinguish the power of subscribing to any other railroad; otherwise a subscription of a hundred thousand dollars to one railroad would exhaust the power, for the argument is based upon the idea that a single exercise of the power exhausts it and leaves

the county *functus officii*. It may be said that such a construction might lead to disastrous consequences by opening the door to subscriptions to a ruinous amount. But no subscription can be made without an election in favor of it. The law simply meant to give the county full liberty on the subject, limiting only the amount of a single subscription. That the limitation contained in the proviso has reference to a single subscription only is apparent from a bare reading of the context. Omitting the surplus words, the section reads thus: 'Any county in this state may subscribe to the stock of any railroad in this state, and issue bonds therefor; provided that the amount of such subscription (that is, the subscription to any railroad) shall not exceed a hundred thousand dollars.' Here the words, any railroad, are used distributively, including all railroads taken severally; and the limitation has reference to the subscription to any railroad, that is, to any one railroad taken separately. Had the legislature desired to limit the power of subscriptions to one hundred thousand dollars, the natural and appropriate mode of doing so would have been either to limit the county to one subscription not to exceed one hundred thousand dollars, or to provide that the amount of its subscription shall not, in the aggregate, exceed one hundred thousand dollars. Neither of these things was done. As the law stands, it confers a general power to subscribe to the stock of any railroad in the state for any amount not exceeding one hundred thousand dollars.''[1]

Where a municipal corporation is authorized to make donations or to borrow money to an unlimited extent, when instructed to do so by a popular vote, and further to issue bonds to fund any indebtedness existing or to be created, it has power to agree to give its obligations upon conditions.[2]

§ 229. **Limitations upon the power of the sale of bonds in aid of railroads.**—The act of the legislature of the state of Pennsylvania of 1853, authorizing municipal aid to railroad companies, contained this provision: "That the amount of

[1] County of Chicot *v.* Lewis, 103 U. S. 164.

[2] Converse *v.* City of Fort Scott, 92 U. S. 503.

subscription by any county shall not exceed ten per cent. of the assessed valuation thereof; and that before any such subscription is made, the amount thereof shall be fixed and determined by one grand jury of the proper county and approved by the same; upon the report of such grand jury being filed, the county commissioners may carry the same into effect by making, in the name of the county, the subscription so directed by the grand jury, provided, that whenever bonds of the respective counties are given in payment of the subscriptions, the same shall not be sold by said railroad company at less than par value, and no bonds shall be in less amount than a hundred dollars, and such bonds shall not be subject to taxation until the clear profits of said railroad shall amount to six per cent. upon the cost thereof, and that all subscriptions made are to be made in the name of any county shall be held and be valid, if made by a majority of the commissioners of the respective counties." The supreme court of the United States in construing the proviso, "that whenever bonds of the respective counties are given in payment of the subscription the same shall not be sold by said railroad company at less than par," held that the limitation upon the company that it could not sell the bonds of the county at less than par after it had taken them in payment of the subscription, had no other meaning than this: that it should not so sell them at the expense of the county, causing any loss to it less than their par value, as they were payable to the company at par in twenty years, with an annual interest of six per cent.[1]

§ 230. **Limitations upon the time and manner of payment of railway aid bonds.**—It is a well settled doctrine in the supreme court of the United States, as we have heretofore shown, that municipal corporations have no power to issue bonds in aid of

[1] Woods *v.* Lawrence Co., 1 Black 386. And this same case holds that where the law authorizing the issue of bonds by a county required that the railroad company should not sell them at less than par value, the right of the holder of these bonds and the coupons to recover their par value is not affected by the fact that the railroad company to whom they were given paid them out to contractors for sixty-four cents on the dollar.

a railroad, except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds, except subject to the limitations and conditions of the enabling act.[1] Accordingly, where the legislature of a state, in authorizing a municipality to subscribe for stock to a railroad company, and to pay for the same by an issue of bonds, prescribed that such bonds should not extend beyond ten years from the date of issuance, it was held by the supreme court of the United States that such a limitation is a restriction on the power to issue bonds.[2]

§ 231. **Illustrations of this subject.**—The act of the Kansas legislature of March, 1872, expressly authorized the issue of bonds, "to aid in the construction of railroads or water power, by donations thereto, or the taking of stock therein, or for other works of internal improvement." Pursuant to this act bonds were issued by Rock Creek Township to aid in the construction of depots and sidetracks by the Atchison, Topeka and Santa Fe Railroad Company in said township. In an action upon certain interest coupons, which were attached to the bonds, the question arose in the circuit court for the District of Kansas whether the bonds were void, for the reason that they were made payable thirty years and thirty-five days from their date of execution therein written, although only drawing interest for the last thirty years of said time. The circuit court held that the bonds were valid. The case was taken before the supreme court of the United States and the judgment of the lower court was affirmed. The court held that the act authorizing their issue provided that the bonds should be payable in not less than five nor more than thirty years from the date thereof, with interest not to exceed ten per cent. per annum,

[1] Sheboygan Co. *v.* Parker, 3 Wall. 93; Wells *v.* Supervisors, 102 U. S. 625; Claiborne Co. *v.* Brooks, 111 U. S. 400; Young *v.* Clarendon Tp., 132 U. S. 346.

[2] Barnum *v.* Town of Okolona, 148 U. S. 393.

all in the discretion of the officers issuing the same. The bonds issued were dated September 10, 1872, made payable thirty years from the 15th day of October, 1872, with interest thereon from that time at the rate of seven per cent. When they were delivered to the railroad company does not appear, though they were not registered by the Auditor of State until October 17, 1872. They were thus practically thirty-year bonds, bearing a less rate of interest than the rate authorized. Their legal effect is precisely what it would have been had the date inserted been October 15 instead of September 10, 1872. Substantially, therefore, the legislative direction was followed.[1]

Where a statute authorizing the issue of railroad bonds provides that they are not to mature at an earlier period than thirty years, a condition in them that upon the failure to pay any installment of interest the principal shall immediately become due is invalid, but it does not avoid the remainder of the contract.[2]

The constitution of New York, limiting a city of over a hundred thousand inhabitants from becoming indebted for any purpose to an amount, including existing indebtedness, of more than ten per cent. of the assessed value of its real estate, "except as herein otherwise provided," which exception includes the issue of water supply bonds, but for a term not to exceed twenty years, does not render void the laws of 1892, authorizing the city of Rochester to issue bonds for a term of fifty years, since the city, though, by reason of its population, subject to the limitation imposed, is not required to avail itself of the exception, where its total indebtedness, with the addition of the imposed bonds, does not reach the prescribed limit, and, therefore, the proviso in respect to the term of the said bonds has no application.[3]

§ 232. **Consolidation or extinction of corporations.**—The supreme court of the United States has held that the authority given to municipalities to subscribe to the capital stock of a

[1] Township of Rock Creek *v.* Strong, 96 U. S. 271; Comrs. of Marion Co. *v.* Clark, 94 U. S. 278.

[2] Howell *v.* McAdem, 94 U. S. 463.

[3] City of Rochester *v.* Quintard, 20 N. Y. Supp. 396, 65 Hun 460, 32 N. E. R. 760, 136 N. Y. 221.

railroad company, and issue bonds therefor, does not become extinguished by the subsequent consolidation of that company with others. The authority may be exercised by municipal officers when they act in their official capacity as the legal representative of the municipality. And the fact that the new corporation belongs to another state does not affect the rule. The same court has also held that under the municipal aid statute of Illinois a subscriber to stock in an incorporated railroad company is released from his subscription by a subsequent alteration of the organization and purposes of the company, only when the alteration is a fundamental one, not contemplated either by the charter of the company or the general statutes of the state.[1] But a vote of a county, authorizing a subscription by the county to the stock of a railroad corporation and the issue of bonds, does not authorize the subscription by the county officers, where they act as agents merely, to the stock of another corporation, although formed by consolidation of the one to which the bonds were voted with another.[2]

An order of a county court in Missouri, which authorized an agent to subscribe to the stock of a railroad company upon certain conditions, and to report to the court thereon, where the agent failed to make such subscription and so report to the court, which approved his report, did not authorize the subsequent subscription to the stock of another company.[3]

Where the constitution of a state requires the assent of two-thirds of all the qualified voters of a county, city or town, as a prerequisite to a subscription to a railroad or other company, bonds of a township issued without such consent for such purpose are invalid. And where a township voted a subscription to one company, which became consolidated with another, thereby forming a third company, to whose stock the subscription was made, it was held that the extinction of the company

[1] County of Scotland *v.* Thomas, 94 U. S. 682, 2 Elliott R. R., § 886; Town of East Lincoln *v.* Davenport, 94 U. S. 801; County of Henry *v.* Nicolay, 95 U. S. 619. As to what is such a fundamental change, see Lynch *v.* Eastern, etc., R. Co., 57 Wis. 430.

[2] Marsh *v.* Fulton Co., 10 Wall. 676; Harshman *v.* Bates Co., 92 U. S. 569.

[3] County of Bates *v.* Winters, 97 U. S. 83.

in whose favor the subscription was authorized worked a revocation of the power to subscribe.[1]

But it has been held that it is not a defense to an action on coupons, by a *bona fide* holder for value without notice, that after a favorable vote of the qualified electors of the township according to law, to subscribe stock to a railroad company, the subscription of stock and the issue of bonds without any further election was made to another company, with which said prior company, in whose favor the vote was had, had become merged and consolidated under a law existing at the time of said election, to form a continuous line.[2]

The power of a municipal corporation to aid a railroad company is said to be, in its essence, a right and privilege of the railroad company which, under the laws of Illinois of 1854, passed to the consolidated company.[3]

Under the statute of Michigan, bonds voted in aid of a railroad company which was subsequently consolidated with another, so as to make a new corporation, were held rightly delivered to the new or consolidated corporation.[4]

Where a donation was originally voted to a railway company which was subsequently consolidated by another, forming a new company, and the records of the town show that the bonds were directed to be issued and delivered to the new company, it is estopped to say, as against a *bona fide* purchaser for value, that the bonds are invalid.[5]

In an action on bonds of a county issued in payment of a subscription to a railroad company, the point that the charter of the company had ceased before the company was organized

[1] Harshman *v.* Bates Co., 92 U. S. 569. See, also, County of Bates *v.* Winters, 97 U. S. 83.

[2] Wilson *v.* Salamanca, 99 U. S. 499. The supreme court of the United States distinguished this case from Harshman *v.* Bates Co. The difference between the two cases is precisely that of a principal and an agent, and it is so expressly said in the Scotland county case. In the one case the corporation is bound if the action of the officers is within their corporate powers, while in the other action must be within their corporate powers delegated to the agent.

[3] Empire *v.* Darlington, 101 U. S. 87. See, also, Menasha *v.* Hazard, 102 U. S. 81.

[4] New Buffalo *v.* Iron Co., 105 U. S. 73; Chickaming *v.* Carpenter, 106 U. S. 663.

[5] Harter *v.* Kernochan, 103 U. S. 562.

was declared by the supreme court of the United States to be a question between the state and the company alone. And whether the corporation had a legal existence or not when the subscription was made is a question that can not be raised in a collateral proceeding; particularly where the corporation did exist as a matter of fact, and was, at that time, in the exercise of all its chartered franchises.[1]

[1] Dallas Co. *v.* Huidekoper, 101 U. S. 81.

CHAPTER X.

FORMAL REQUISITES OF BONDS AND MODE OF ISSUE.

§ 233. Form of bonds and mode of execution.
234. The mode prescribed to issue bonds must be followed in execution of power.
235. Signature to bonds.
236. Presumption as to official signatures.
237. Purchaser of bonds must take the risk of the genuineness of official signatures.
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243. To whom payable—How transferred.
244. When municipal bonds may be authorized by resolution.
245. Non-compliance with the constitutional requirements.
246. Bonds issued in blank as to payee.
247. As to the time of maturity of bonds.
248. Place of payment of bonds.
249. What officers must act.
250. Doctrine of the supreme court of the United States as to various irregularities.

§233. **Form of bonds and mode of execution.**—The form of a municipal bond, as a rule, is that of an instrument under the seal of the municipality, signed by designated officers or agents, who are authorized to bind the municipality. It is usual to specify in the bonds the act of the legislature authorizing the issue of the bonds. The particular form in which they may be issued, if not prescribed by law, is not material to their validity. However, while no particular form is essential, unless prescribed by statute, all questions concerning the form and mode of execution must be referred to, tested by and decided in strict conformity with the terms of the enabling statute or other law governing their issue. Municipal bonds usually have the body of the bonds printed or engraved with some appropriate caption containing a formal acknowledgment of the amount of indebtedness of the municipality as ev-

idenced by such bonds, with a promise to pay such amount to a payee named in the bond, or more frequently to bearer, at a designated place, with interest at a specified rate per annum, payable annually or semi-annually, as evidenced by coupons attached to the bonds. As a rule the bond also contains a recital of the purpose for which it is issued; the aggregate amount of the issue; the law which authorizes the issue; that it is in strict compliance with, and conformity to, the law authorizing the issue of the same; a pledge of the municipal faith and credit to the payment of the bond; and finally a recital of its execution, with the signatures of the proper municipal officers subscribed thereto and attested by the corporate seal of the municipality issuing the bonds.

§ 234. **The mode prescribed to issue bonds must be followed in execution of power.**—The legislature, in conferring powers upon municipal corporations, may impose such terms and conditions as it chooses, and if a particular mode is prescribed in which a power shall be exercised, the municipality can not adopt a different one, or if the power is conferred on one set of officials or individuals, it can not act by or through a different set of officials or persons.[1]

Where the board of county commissioners make an order to submit to a vote of the electors of the county the question of issuing the bonds of the county in a sum not to exceed thirty thousand dollars, for the erection of permanent county buildings, and subsequently such proposition is submitted to a vote of the electors, such order and submission necessarily imply that the board has determined that thirty thousand dollars, or at least a sum not exceeding thirty thousand dollars, is necessary to be raised by loan for the purpose proposed; and hence such order and submission are not invalid or void under the provisions of the statute, because not more expressly stating

[1] Gaddis *v.* Richland Co., 92 Ill. 119; Attorney-General *v.* City of Salem, 103 Mass. 138; People *v.* Clark, 53 Barb. 171; Attorney-General *v.* Burrell, 31 Mich. 25; People *v.* Booth, 32 N. Y. 397; Phillips *v.* Jefferson Co., 5 Kan. 412; Wabaunsee Co. *v.* Walker, 8 Kan. 431; Kansas, etc., Railway Co. *v.* Comrs., etc., 16 Kan. 587; Sapp *v.* Comrs., etc., 20 Kan. 243; Thimes *v.* Stumpff, 33 Kan. 53.

therein that the board has determined the sum necessary to be raised.[1]

This subject has been considered and discussed by the supreme court of the United States. In 1872 the legislature of Missouri passed an act providing for the registration of bonds issued by counties, cities and incorporated towns and to limit the issue thereof. The act contained a provision "that before any bonds hereafter issued by any county, city or incorporated town, for any purpose whatever, shall obtain validity, or be negotiated, such bonds shall first be presented to the state auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the state bonds are now registered, and who shall certify by indorsement on said bonds that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor." The supreme court of the United States in construing this provision of the statute declared that there can be no doubt that it is within the power of the state to prescribe the form in which municipal bonds shall be executed, in order to bind the public for their payment. If not so executed, they create no legal liability. Other circumstances may exist which will give the holder an equitable right to recover from the municipality the money which the paper he has got represents but he has no bond which he can enforce as such, or which he can put on the market as commercial paper.[2]

§ 235. **Signature to bonds.**—The statutes generally prescribe that it is the duty of the mayor, or other executive officer of the municipality, to sign the bonds, and they are usually attested or countersigned by the clerk of the municipality or some other subordinate officer. The supreme court of the United States has held that where the statutes provide that the bonds of a city shall be signed by the mayor, they must be

[1] Johnson *v.* Comrs., etc., 34 Kan. 670.

[2] Anthony *v.* County of Jasper, 101 U. S. 693.

signed by the person who is mayor of the city when they are signed and not by any other person; and the city council can not delegate or authorize them to be signed by any other person.[1]

So, where bonds were issued by a municipality in payment of a subscription to railway stock, under a statute which made the signature of a particular officer essential, it was held by the supreme court of the United States that without the signature of that officer the bonds were not the bonds of the municipality, and that the municipality was not estopped from disputing their validity by reason of recitals in the bond setting forth the provisions of the statute in compliance with them.[2]

In a suit upon bonds issued under the Nebraska statutes, where their validity was drawn in question in the supreme court of the United States, it was contended that the statute required that certain precinct bonds should be issued as special county bonds for the precinct, by the county commissioners, and did not authorize the chairman of the board and its clerk to issue the bonds; that the county commissioners could not delegate their authority to sign and issue the bonds to any one else or to one of their number; and that precinct bonds, signed by one of the county commissioners, as chairman, and attested by the clerk of the board, and coupons signed by some one as clerk, have no validity. The opinion of the court was delivered by Mr. Justice Blatchford, who said: "We see no force in these objections. The bonds bear the seal of the county and purport to be issued by the county commissioners on behalf of the precinct. The bond states that the board, in testimony of the statements in the bond, has caused the bond to be signed on behalf of the precinct, by the chairman of the board, and to be attested by the clerk of the board (who appears, by the petition, to have been the clerk of the county), and that such clerk has affixed thereto the seal of the county. This was a sufficient compliance with the statute The com-

[1] Coler *v.* Cleburne, 131 U. S. 162.

[2] Bissell *v.* Spring Valley Township, 110 U. S. 162; Northern Bank, etc., *v.* Porter Township Trustees, 110 U. S. 608; Merchants' National Bank *v.* Bergen Co., 115 U. S. 384; Anthony *v.* County of Jasper, 101 U. S. 693.

missioners, by statute, constituted a board. That was their official designation, when meeting to perform any duties with which they were charged. The attestation of the bonds by the signatures of the chairman and the clerk of the board and the county seal was proper. It was not necessary that all the commissioners should sign the bonds. What was done was not an issuing of the bonds by the chairman and clerk.'"[1]

§ 236. **Presumption as to official signatures.**—Under a statute which required municipal bonds to be signed by the mayor of a city, it has been held that the statute was sufficiently complied with by the signature of the bonds by the person occupying the office at the date of their negotiation and delivery, though he was elected after the day of their date.[2]

The supreme court of Nebraska has held that where the name of the proper officer was written by another person at his request, and afterwards treated by him as his own signature, by participating in the negotiation and sale of the bonds, they were valid in the hands of a *bona fide* holder for value.[3]

If the statute is silent as to the person who shall sign the bonds, they should be signed and executed by the municipal officers who have the care, management and control of the city and its finances.[4]

§ 237. **Purchasers of bonds must take risk of genuineness of official signatures.**—Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes, not only the genuineness of the signature itself, but the official character of him who makes it.

[1] Blair *v.* Cuming Co., 111 U. S. 363.

[2] Yesler *v.* City of Seattle, 1 Wash. St. 308, 25 Pac. R. 1014.

[3] School District, etc., *v.* First Nat'l Bank, 19 Neb. 89.

[4] Lane *v.* Inhabitants, etc., of Embden, 72 Me. 354; Middleton *v.* Mullica Township, 112 U. S. 433; Walnut Tp. *v.* Wade, 103 U. S. 683; Town of Windsor *v.* Hallett, 97 Ill. 204. And it has been held sufficient, as to *bona fide* holders, that the bonds were signed by *de facto* officers. County of Ralls *v.* Douglass, 105 U. S. 728. See, generally, Town of Danville *v.* Montpelier, etc., R. Co., 43 Vt. 144; County of Kankakee *v.* Ætna Life Ins. Co., 106 U. S. 668, 2 Sup. Ct. R. 80.

[5] Anthony *v.* County of Jasper, 101 U. S. 693; Merchants' Bank *v.* Bergen Co., 115 U. S. 384.

§ 238. **Date—Effect of ante-dating bonds.**—As a general rule the public can act only through its authorized agents, and is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He can not bind his principal under powers that have been taken away, by simply ante-dating his contracts. Under such circumstances, a false date is equivalent to a false signature ; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been revoked he can not bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, can not charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Ante-dating, under such circumstances, partakes of the character of forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does.[1]

Where the bonds were not signed by an officer who was in office when they were signed, but by a person who was in office on the ante-dated day on which they bore date, and who was, when he signed them, a private citizen, it was held that the bonds were not valid.[2]

But it has been held that a *bona fide* purchaser of bonds without knowledge of the fact that the bonds were invalid on account of such a defect may recover the money actually received by the corporation.[3]

The supreme court of Nebraska has held that the true date of the issuance of a bond is the date when it actually passes out of the custody and control of the corporation pursuant to contract, and not necessarily the day of the date which it bears.[4]

[1] Anthony *v.* Jasper Co., 101 U. S. 693.

[2] Coler *v.* Cleburne, 131 U. S. 162.

[3] Louisiana *v.* Wood, 102 U. S. 294.

[4] School District *v.* First Nat'l Bank, 19 Neb. 89.

The fact that the bond was dated some days after the date of the ordinance providing for its issue is not a substantial defect, if all the other provisions of the law have been complied with.[1]

The validity of municipal bonds is not affected by an apparent irregularity which does not operate as an evasion of any provision of law, or a departure from the proposition ratified by the voters. Thus, on January 10, 1895, the board of county commissioners, under the laws of Nebraska, ordered an election for the purpose of voting on a proposition to issue funding bonds. The election was held February 19, and the proposition carried. The bonds were presented for registration in April. They were in exact conformity with the proposition submitted, bore interest at six per cent., matured twenty years after date, and were redeemable at the option of the county board ten years after date, but were dated January 2, 1892, this date being a portion of the proposition submitted to vote. In a direct proceeding in the supreme court of Nebraska for a mandamus to compel the respondent to register certain bonds, it was held by that court that the ante-dating of the bonds under these circumstances was not a substantial defect, and that such an irregularity did not affect the bonds.[2]

§ 239. **Delivery of bonds essential.**—Delivery is as essential to the validity of a municipal bond as any other written contract for the payment of money. The mere execution in proper form of such instruments is not sufficient. They must be delivered by the proper officials to those for whom they are intended. And should any one obtain possession of one of these bonds which had not been so delivered, whether obtained by fraud or undue means, he would have no title which could be enforced. This is undoubtedly true as to the original holder, or a holder with notice of the infirmity in its origin; but the case of a *bona fide* holder, without notice of the defect as to de-

[1] Flagg *v.* Mayor, 33 Mo. 440.

[2] State *v.* Moore, 46 Neb. 590; Flagg *v.* Mayor, 33 Mo. 440; Comrs. of Marion *v.* Clark, 94 U. S. 278; Township of Rock Creek *v.* Strong, 96 U. S. 271; Dows *v.* Town of Elmwood, 34 Fed. R. 114. The case was distinguished from such cases as Wood *v.* City of Louisiana, 5 Dillon 122; Louisiana *v.* Wood, 102 U. S. 294; Anthony *v.* County of Jasper, 101 U. S. 693, and Coler *v.* Cleburne, 131 U. S. 162.

livery, is, we apprehend, entirely different. The weight of authority as to a negotiable instrument of private parties, which by fraud or inadvertence has passed into the hands of holders for value without notice of the manner in which it was put into circulation, is that the makers are bound, although they did not intend that the note should be put into circulation. The want of delivery is not a defect apparent on the face of the paper. The maker has given to it all the appearance of validity, and if one of two innocent parties is to suffer, he who has put it into the power of the third party to produce this condition of things ought to bear the loss.[1]

Thus, the holder of bank notes which were signed and ready for use, and which were stolen from the vault in which they had been deposited, before they were issued from the bank, recovered against the bank.[2] On the same principle the maker of a note who signed it as a matter of amusement, was held liable to an innocent holder, who received it from one who had stolen it.[3]

If a state or a municipality causes its obligations to be executed in complete form, and before they are delivered to those for whom they are intended they are stolen and come into the hands of a *bona fide* holder for value, without notice of the defect of their origin, who should suffer of these two innocent parties? It is difficult to find a satisfactory distinction between a state or a municipality and a private person under these circumstances. And in the case of the United States *v.* Cook the inclination in that case is evidently to hold the United States liable under such circumstances.[4]

But the supreme court of the United States has held that the act of delivery is essential to the existence of any bond. Although drawn and signed, so long as it is undelivered it is a nullity; not only does it take effect only by delivery, but also

[1] Kinyon *v.* Wohlford, 17 Minn. 239; Clarke *v.* Johnson, 54 Ill. 296; Burson *v.* Huntington, 21 Mich. 415.

[2] Worcester County Bank *v.* Dorchester, etc., Bank, 10 Cush. 448. See, also, Dutchess, etc., Co. *v.* Hachfield, 73 N. Y. 226; Murray *v.* Lardner, 2 Wall. 110; Consolidated Ass'n *v.* Avegno, 28 La. Ann. 552.

[3] Shipley *v.* Carrol, 45 Ill. 285; 1 Daniel on Neg., Instruments, §§ 823, 838, 840, and cases cited.

[4] Cooke *v.* United States, 12 Blatchford (U. S.) 43.

only on delivery.[1] In the case cited the enabling act of the legislature provided that the bonds when "issued" should be "delivered by the person * * * having charge of the same to the treasurer of this state;" that the treasurer should "hold the same as a trustee for the municipality issuing the same and for the railroad company for which they were issued;" that whenever the railroad company should "present to said treasurer a certificate from the governor of this state that such railroad company has in all respects complied with the provisions of this act * * * such of said bonds as said company shall be entitled to receive shall be delivered to said company;" the treasurer shall indorse upon each bond delivered the date of the delivery and to whom it was delivered; and in case the bonds were not demanded in compliance with the terms of the act within three years from the date of the delivery to the treasury, "the same shall be canceled by said treasurer and returned to the proper officers of the township or city issuing the same." The township of Clarendon, in Michigan, having complied with the requirements of the act on its part, delivered to the state treasurer its bonds to the amount of ten thousand dollars, dated July, 1869, for the benefit of the Michigan Air Line railroad company. The company completed the road before February, 1871, and became entitled to the governor's certificate under the act; but on May 26, 1870, the supreme court of the state had declared the act to be unconstitutional, and the governor, in consequence thereof, refused to give his certificate. On the 28th of May, 1872, before the expiration of three years from their delivery, the treasurer returned the bonds to the township. November 12, 1884, the appellant obtained judgment against the railroad and an execution was returned *nulla bona*. On the 24th of February, 1885, he filed a bill in equity against the township and the company, claiming that the township was equitably indebted to the company to the amount of the bonds and coupons with interest, and that he was entitled to recover the amount of that indebtedness. The court held: (1) That the municipal authorities had no power to deliver the bonds, after their exe-

[1] Young *v.* Clarendon Tp., 132 U. S. 340.

cution, except to the state treasurer. (2) That to the governor alone was given the power to determine whether the bonds should ever in fact issue, and if issued, when they should issue. To him was committed the decision of the important question whether the railroad company had performed its part of the common undertaking. His certificate was to be the evidence of that fact, and the only admissible authentication of it to trustee, the depository. (3) That the indorsement of the treasurer on each bond was necessary to make it a complete bond, and that this could not be done until the governor's authorization was made. (4) That, as the bonds were never so indorsed and delivered by the treasurer, they never became operative.

§ 240. **Seal as a requisite to the validity of bonds.**—A seal is a common law requisite to the validity of a bond, and the statutes, as a rule, generally prescribe that municipal bonds shall be attested with the seal of the municipality. If, however, it appears to have been the legislative intent that the municipality shall be bound regardless of the seal, the bond will be valid, although not impressed with the seal of the municipality. Thus, where a town in New York was authorized to subscribe for stock of a railroad company and issue its bonds therefor, it was held by the supreme court of the United States that the bonds issued without seal were valid. The opinion of the court was delivered by Mr. Justice Bradley who said . "It is apparent from the law, that the substantial thing authorized to be done on behalf of the town was, to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock and issuing the obligations of the town in payment thereof. The technical form of the obligation was a matter of form rather than a matter of substance. The issue of bonds under seal, as contradistinguished from bonds or obligations without a seal, was merely a directory requirement. The town, indeed, had no seal; and the individual seals of the commissioners would have had no legal efficacy; for the bonds were not their obliga-

tions, but the obligations of the town; and their seals could have added nothing to the solemnity of the instrument.'"[1]

In a later case the supreme court of the United States declared that if commissioners, authorized by the statute to subscribe in the corporate name of the town for stock in a railroad company, and, upon obtaining the consent of a certain majority of tax-payers, to issue bonds in the town under the hands and seals of the commissioners, and to sell the bonds and invest the proceeds of the sale in stock of the railroad company, which shall be held by the town with all the rights of other stockholders, issue, without obtaining the requisite consent of the tax-payers, to the railroad company, in exchange for stock, such bonds signed by the commissioners, but on which the seals were omitted by oversight and mistake, and the town sets up the want of seals in defense of an action at law afterwards brought against it by one who has purchased such bonds for value, in good faith and without observing the omission, to recover interest on the bonds, a court of equity, at this suit, will decree that the bonds be held as valid as if actually sealed before being issued and will restrain the setting up of the want of seals in the action at law.[2]

It has been settled upon fundamental principles of equity jurisprudence, by many precedents of high authority, that when the seal of a party, required to make an instrument valid and effectual at law, has been omitted by accident or mistake, a court of chancery, in order to carry out the intention, will, at the suit of those who are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant the relief accordingly, either by compelling the seal to be affixed or by restraining the setting up of the want of it to defeat a recovery at law.[3]

[1] Draper *v.* Springport, 104 U. S. 501.

[2] Bernards Township *v.* Stebbins, 109 U. S. 341.

[3] Smith *v.* Ashton, Freem. Ch. (Eng.), 308; Cockerell *v.* Cholmeley, 1 Russ. & M. 418-424; Wadsworth *v.* Wendell, 5 Johns. Ch. 224; Montville *v.* Haughton, 7 Conn. 543; Rutland *v.* Paige, 24 Vt. 181; Wiser *v.* Blachly, 1 Johns. Ch. 607; Green *v.* Morris, etc., Railroad Company, 12 N. J. Eq. 165, and 15 N. J. Eq. 469; Druiff *v.* Lord Parker, L. R., 5 Eq. Cas. 131; Bernards Tp. *v.* Stebbins, 109 U. S. 341, 3 Sup. Ct. Rep. 252.

When a state act authorizes a city to issue bonds bearing interest or otherwise pledge the faith of the city, it is immaterial that the securities issued are not sealed.[1]

In New York, where the common law doctrine in regard to seals is in force, except as modified by statute, it was held, where the statute required the bonds to be attested by the corporate seal, if the corporation had a seal, and if not, then by the individual seals of the commissioners, that a scroll was not sufficient. But the court declared that it does not follow that the bonds are, for that reason, invalid. There are no negative words in the statute declaring or necessarily implying such effect of the omission of the seal, and whether or not this requirement was merely directory, as announced by the supreme court of the United States in a case involving this identical question,[2] and as the bonds were issued and delivered by the commissioners in the performance of their duty and upon a consideration, the mistake or failure to affix their seals does not defeat the validity of the bonds.[3]

Where the statute of New York authorized the town to issue bonds, and instruments were issued with coupons attached and formal in all respects except that they bore no seals, it was held that they were valid bonds notwithstanding the failure or omission of such seals. The opinion of the court was delivered by Justice Denio, who used the following language: "Whatever force there may generally be in the words 'bond or bonds,' which were used in the act, it is overcome by the explicit directions as to their execution." The act authorizing the issue of the bonds provided that they should be executed under the official signatures of the supervisors and the commissioners.[4]

§ 241. **Number of bond.**—For convenience in the issuing, registering and payment of the principal, and especially the

[1] San Antonio *v.* Mehaffy, 96 U. S. 312.

[2] Draper *v.* Springport, 104 U. S. 501.

[3] Town of Solon *v.* Williamsburg Savings Bank, 35 Hun (N. Y.) 1, 114 N. Y. 122; People *v.* Mead, 24 N. Y. 114; Kelly *v.* McCormick, 28 N. Y. 318; Board of Education *v.* Fonda, 77 N. Y. 350.

[4] People *v.* Mead, 24 N. Y. 114. The same doctrine has obtained in Maine. Augusta Savings Bank *v.* City of Augusta, 56 Me. 176.

interest on bonds, they are almost invariably numbered, and the coupons generally refer to the number of the bond to which they are attached. The number is not a material part of the bond, and therefore its alteration or erasure, even with fraudulent intent, has been held not to affect a *bona fide* holder for value, without notice of the alteration or erasure.[1]

In New Jersey the court held that the number of the bond is put upon it as a mark denoting, for the convenience of the maker, that it is one of a series; but such mark does not enter into or in any wise affect the agreement embodied in it; the purchaser has nothing to do with it, and need give it no heed. To lay down the broad doctrine that the alteration in such an incidental and unnecessary characteristic as this, by a person possessed of no legal title to the instrument, will have the effect of annulling such an instrument in the hands of a *bona fide* holder, who has purchased and paid for it in the ordinary course of trade, would be to impair the rights of all persons dealing in this species of property.[2]

§ 242. **Amount payable as a requisite in the bond.**—The amount payable must be specified in the bonds issued by municipal corporations, and must be certain, in order to make the bonds negotiable. The same rule applies to such cases as is applicable in other negotiable instruments.[3]

This doctrine is illustrated in a case which arose in the supreme court of the United States in 1878 from the state of Louisiana. A railroad company had issued certain bonds payable to A or bearer, in the sum of either two hundred and twenty-five pounds in London or one thousand dollars in New York or New Orleans, the place of payment to be fixed by the president of the company by his indorsement, but the place of payment was left blank in the indorsement. This blank was never filled, and the bonds were afterwards seized and carried off during the war and sold, with past due coupons, for a small consideration, in the city of New York. The supreme court

[1] Birdsall *v.* Russell, 29 N. Y. 220; Commonwealth *v.* Emigrants' Savings Bank, 98 Mass. 12.

[2] City of Elizabeth *v.* Force, 29 N. J. Eq. 587.

[3] 1 Danl. on Neg. Instruments, § 53.

held that the uncertainty of the amount payable, in the absence of the required indorsement, was of itself a defect which deprived those instruments of the character of negotiability. And where such bonds were never issued by the railroad company, but were seized and carried off by a raid of soldiers during the war, and had past due coupons attached, and were offered for a very small consideration, purchasers were affected with notice of their invalidity, and therefore could not sustain the position of *bona fide* holders without notice. The opinion of the court was delivered by Mr. Justice Bradley, who used the following language: "The uncertainty of the amount payable, in the absence of the required indorsement, is of itself a defect which deprives these instruments of the character of negotiability. As they stand, they amount to a promise to pay so many pounds, or so many dollars, without saying which. One of the first rules in regard to negotiable paper is that the amount to be paid must be certain, and not be made to depend on a contingency.[1] And, although it is held that *id certum est quod certum reddi potest*—a maxim which would have given the bonds negotiability in this instance, had the requisite indorsement been made, yet, without such indorsement, the uncertainty remains, and operates as an intrinsic defect in the security itself. Now it is shown by the master's report, and if it were necessary to go behind the report, the evidence shows that these bonds were never issued by the railroad company at all, but were seized and carried off by a raid of soldiers during the war. They afterwards turned up in New York and were purchased by the appellants; and the question is, whether the fact that the past due coupons were still attached, and that no place of payment was indorsed on the bonds, as required to be done by the bonds themselves, was sufficient to put the appellants upon inquiry as to their validity and as to the *bona fides* of their issue; these marks of suspicion being supplemented by the further fact that the bonds were offered for a very small consideration. Our opinion is, that the appellants had abundant cause to question the integrity of these bonds, that they were affected with notice of their invalidity,

[1] 1 Danl. on Neg. Instruments, § 53.

and can not be allowed to sustain the position of *bona fide* holders without notice. The presence of the past due and unpaid coupons was itself an evidence of dishonor, sufficient to put the purchasers on inquiry. The imperfection as to the place of payment is another strong evidence of want of genuiness. Of course, it is not necessary to the validity of a bond that it should name a place of payment, but these bonds expressly declare that they are to be payable at the place that should be determined by the president's indorsement, and that the sum payable should depend upon that indorsement; and yet no indorsement appears thereon. We do not say that this defect would have invalidated the bonds if they had in fact been issued by the company, and the amount had been certain; but it was a pregnant warning to the purchasers to inquire whether they had been issued or not. These facts, taken in connection with the price at which the bonds were offered, were abundantly sufficient to affect the purchasers with notice of any invalidity in their issue. The case is so plain, that it is hardly necessary to cite any authorities on the subject."[1]

§ 243. **To whom payable—How transferred.**—Bonds are generally made payable to the party to whom they are issued or to bearer; and in such cases are transferrable by delivery. Sometimes they are payable to the holder, which term is regarded as equivalent to bearer. Any other equivalent expression indicating an intention to make the instrument negotiable will suffice for that purpose. Thus the supreme court of the United States held that county bonds payable to a railroad company or holder, if the bonds are transferred by the signature of the president of the company, are negotiable, and after a transfer may be sued upon by the holder.[2]

Sometimes they are payable to a certain party, "or their successors and assigns." Thus, a statute under which bonds of a county were issued, required that they should be made

[1] Parsons *v.* Jackson, 99 U. S. 434; Andrews *v.* Pond, 13 Pet. 65; Fowler *v.* Brantley, 14 Pet. 318. When the statute specifically provides what the denomination of the bonds shall be, it must be obeyed. County of Greene *v.* Daniel, 102 U. S. 187.

[2] County of Wilson *v.* Third National Bank, 103 U. S. 770. See, also, *post*, § 255.

payable to a railroad company, its successors and assigns, and they were made payable to the company or bearer. It was held by the supreme court of the United States that the statutory requirement in this particular is only directory, the defect is one of form and not of substance, and the county is estopped to take advantage of it by the recital in the bonds of conformity to the statute.[1]

§ 244. **When municipal bonds may be authorized by resolution.**—Where bonds are issued under the laws of Kansas, which declare that cities may borrow money and issue bonds therefor whenever the city council shall be instructed so to do by a vote of the inhabitants, it is no objection to the validity of such bonds that the council submitted the matter to the electors by means of a resolution, rather than an ordinance, where there is nothing in the statute expressly requiring an ordinance in such case.[2]

§ 245. **Noncompliance with the constitutional requirements.**—A board of education, authorized to issue bonds, issued them without complying with the constitutional requirement of South Dakota, that, at or before the time of incurring such indebtedness, provision should be made for the collection of an annual tax to pay interest and principal, although the board had full power to make such provision, but the bonds recited "that all conditions and things required to be done precedent to and in the issuing of said bonds have duly happened and been performed in regular and due form as required by law." In a suit upon the bonds it was held by the United States Circuit Court of Appeals that the non-compliance with such requirement was not available to the board as a defense against *bona fide* purchasers of the bonds.[3]

[1] Calhoun *v.* Galbraith, 99 U. S. 214; White *v.* Vermont, etc., Railroad Company, 21 How. 575; Preston *v.* Hull, 23 Grat. 600.

[2] City of Alma *v.* Guaranty Savings Bank, 60 Fed. R. 203; National Bank of Commerce *v.* Town of Granada, 54 Fed. R. 100; 4 C. C. A. 212; 10 U. S. App. 692, distinguished.

[3] National Life Ins. Co. *v.* Board of Education, 62 Fed. R. 778.

§ 246. **Bonds issued in blank as to payee.**—It is, perhaps, a well settled doctrine in England that a bond delivered in blank, as it respects the payee, is void, and the blank incapable of being filled up by the holder, either upon an implied or express parol authority from the maker. This is maintained upon the principle that the authority of an agent to make a deed for another must be by deed; and, also, that to admit the parol authority to fill up the blank would, in effect, make a bond transferrable and negotiable, like a bill of exchange or exchequer bill.[1]

It was otherwise held by Lord Mansfield.[2] But this doctrine was overruled by Park B. in delivering the opinion of the court in the case of Hibblewhite *v.* M'Morine and the opinion reaffirmed by him still more strongly in the second case above cited. The courts of the highest authority in this country have followed the doctrine laid down by Lord Mansfield and have not hesitated to meet the fears expressed by Park B., that the effect would be to make bonds negotiable by admitting the consequences. Chief Justice Marshall, in an early case involving this question, hesitated to reach this conclusion, but expressed a strong belief that at some future day it would be the law of this court.[3]

In a case which came to the supreme court of the United States in 1858 from the circuit court of Massachusetts the bonds in question had been issued by a railroad company, and for sufficient consideration, to a citizen of Massachusetts, and were payable in blank, no payee being inserted, and came into the hands of the plaintiff through several intervening holders, in regular course of business. It was held by the supreme court that it was the intention of the company, by issuing the bonds in blank, to make them negotiable and payable to the holder, or bearer, and that the holder might fill up the blank with his own name or make them payable to himself or bearer, or to order. And until the plaintiff chose to fill up the blank, he was to be regarded as holding the bonds as

[1] Hibblewhite *v.* M'Morine, 6 Mees. & W. 200; Enthoven *v.* Hoyle et al., 9 Eng. L. & Eq. 434.

[2] Master *v.* Miller, 1 Anst. 225.

[3] The United States *v.* Nelson & Myers, 2 Brock 64.

bearer, and held them in this character till made payable to himself or order.[1]

§ 247. **As to the time of maturity of bonds.**—The supreme court of Illinois has held that when a statute is silent as to the time when the bonds shall be made payable, and the terms and conditions on which they shall be made payable, such matters are left to the determination of the municipal officers who issue the bonds and the purchaser.[2]

But if a time is fixed by the statute when the bonds shall be made payable, and also the terms and conditions upon which they shall be made payable, such a provision is a limitation upon the grant of power, and bonds issued in disregard of such provision are held to be invalid.[3]

The supreme court of New Jersey has held that bonds may be made payable in a shorter period than provided for by statute. In passing upon that question the court declared that if the contract was in opposition to the express legislation, to public policy or to any general principle of law, then such contract must fail; but its want of coincidence with mere naked formalities and statutory directions not intended to be the essence of the thing authorized will not have such effect. The circumstance that the bonds were required to be made payable in twenty years rather than in five or within any other designated period, could not be a matter of substance or anything but an immaterial incident to the act authorized.[4]

The supreme court of Massachusetts has held that where the bonds contain upon their face an unconditional promise to

[1] White *v.* Vermont & Massachusetts Railroad Co., 21 How. 575. See, also, Chapin *v.* Vermont, etc., R. Co., 8 Gray (Mass.) 575; note to Morris Canal, etc., Co. *v.* Fisher, 64 Am. Dec. 423; note to McClelland *v.* Norfolk, etc., R. Co., 1 L. R. A. 929; 2 Elliott R. R., § 484; *post*, § 252. But compare Evertson *v.* Nat. Bank, 66 N. Y. 14, 23 Am. R. 9; Augusta Bank *v.* Augusta, 49 Me. 507.

[2] Chicago R. R. Co. *v.* Aurora, 99 Ill. 205; 2 Elliott R. R. § 880.

[3] Woodruff *v.* Okolona, 57 Miss. 806; Davis *v.* County of Yuba, 75 Cal. 452.

[4] Singer Mfg. Co. *v.* Elizabeth, 42 N. J. L. 249; Potter *v.* Town of Greenwich, 26 Hun (N. Y.), 326. But see Barnum *v.* Okolona, 148 U. S. 393. Nor will a provision that they may be paid before maturity or on or before a certain date destroy their negotiability. Union Cattle Co. *v.* International, etc., Co., 149 Mass. 492; Union, etc., Co. *v.* Southern, etc.. Co., 51 Fed. R. 840.

pay at a certain date, a purchaser in good faith is not bound by a stipulation made with the agents who sold the bonds, that a certain portion of them should be redeemed yearly. Such purchaser is not obliged to look beyond the statute conferring the power.[1]

In a case in Pennsylvania school bonds were made payable "in twenty-five years after date with interest." Each bond contained this provision: "This bond will be redeemed, if desired, twelve years after date." Accordingly, when the twelve years had elapsed, the school district, desiring to pay off the bonds, tendered the principal and accrued interest in full. This was refused by the holder of some of the bonds, who afterwards brought suit for the subsequently accrued interest. The supreme court of Pennsylvania held that the word "in" did not mean at any time within or during; that the bonds were not payable until the twenty-five years had elapsed, and that the declaration of each bond, that it "will be redeemed, if desired, twelve years after date," was for the benefit of the holder, and at his option alone. The court said: "The bonds, on their face, purport to have been issued as security for a twenty-five years loan. The semi-annual interest for that entire period is provided for by the coupons attached to and forming part of each bond; and there is nothing to indicate that the school district has any right to pay the principal before the expiration of the time named. The declaration at the close of each bond, that it "will be redeemed, if desired, twelve years after date," is evidently intended for the benefit of the holder alone, giving him the option of demanding payment of the principal at the expiration of twelve years. If he then desired payment, the school district was bound, on his demand, but not of its own motion, to redeem the bonds by paying the principal and accrued interest. If it were not for the word 'in' before the words 'twenty-five years after date,' there would be nothing on which to hang even a doubt as to the meaning of the last quoted expression. It is contended the word 'in' is used in the sense of 'within' or 'at any time during,' etc. While it may be sometimes em-

[1] Suffolk Savings Bank *v.* Boston, 149 Mass. 364.

ployed in that sense we do not think it was so intended in the bonds under consideration; but if there should be any uncertainty as to the sense in which it was used, the doubt should be resolved in favor of the obligee.''[1]

The supreme court of the United States has held that the time which bonds may run may be estimated from a future date, when the time is reasonable for issuing and delivering the bonds and placing them on the market. Thus, where an act of the legislature of Kansas authorized the issue of bonds and provided that the bonds should be payable in not less than five nor more than thirty years from the date thereof, it was held that this provision of the statute was directory and not of the essence of the power.[2]

But where the bonds are issued under a statute which provides that they shall not extend beyond a specified number of years from the date of their issuance, such limitation must be regarded as in the nature of a restriction on the power to issue bonds, and the municipality has no power to make them payable after a longer period.[3]

§ 248. **Place of payment of bonds.**—It is a well-settled doctrine in the supreme court of the United States that the power of a municipal corporation to make any contract does not depend upon the place of performance but upon its scope and object. And, therefore, where no place of payment of the bonds is designated by the statute, it is competent for the officers who issued the bonds to make them payable in another state. Thus, where the board of supervisors of a county in the state of Mississippi issued bonds in aid of a railroad company, and no place of payment was designated by the statute, the supreme court of the United States held that it was competent for the supervisors to make the bonds payable in New York City.[4]

[1] Allentown School District *v.* Derr, 115 Pa. St. 439; White *v.* Smith, 33 Pa. St. 186; Beeson *v.* Patterson, 36 Pa. St. 24; Klaer *v.* Ridgway, 86 Pa. St. 529.

[2] Township of Rock Creek *v.* Strong, 96 U. S. 271; Daws *v.* Town of Elmwood, 24 Fed. R. 114; Comrs. of Marion *v.* Clark, 94 U. S 278.

[3] Barnum *v.* Town of Okolona, 148 U. S. 393.

[4] Calhoun Co. *v.* Galbraith, 99 U. S.

It is not unusual for municipalities issuing bonds to designate a particular bank as a place of payment, and still more frequently the place of payment is specified in the coupons. Nebraska, Kansas, and a number of the other states and territories have provided by statute for the establishment of a fiscal agency where their municipal bonds and coupons may be made payable. While nearly all the state and federal courts have held that municipalities may make their bonds payable beyond the limits of the state in which they are issued, in Illinois the contrary doctrine obtains. The supreme court of that state has held that in the absence of special legislative authority to make the place of payment at a designated place, a municipality of that state can only be required to pay its bonds at the usual office of its treasurer. The court laid down the doctrine that municipalities were created for public convenience only, and are not required to seek their creditors to discharge their indebtedness, but when payment is desired the demand shall be made at their treasury, that is the only place where the treasurer can legally have the public funds with which he is entrusted. To authorize an officer to draw his warrant on the treasurer, payable in a sister state or in a foreign country, necessarily imposes an obligation on the treasurer to provide funds at that place to meet them, and his duties requiring him at the treasury would require the employment of agents, the transmission of the funds at a risk of loss, and a considerable expense in charges, insurance and discounts, which are not incident to its payment at the treasury. And therefore, in the opinion of the court, in the absence of legislative enactment municipalities have no power to make their indebtedness payable at any other place than at their treasury.[1] But even according to the doctrine of the Illinois courts, the fact that

214; Mayor *v.* Muscatine, 1 Wall. 384; Lynd *v.* The County, 16 Wall. 6; Thomson *v.* Lee Co., 3 Wall. 327; Evansville, etc., R. Co. *v.* City of Evansville, 15 Ind. 395; City of Lexington *v.* Butler, 14 Wall. 282; Gelpcke *v.* Dubuque, 1 Wall. 175. See, also, Enfield *v.* Jordan, 119 U. S. 680. But in the absence of any provision as to the place of payment, they are payable at the treasury of the municipality. Friend *v.* City of Pittsburg, 131 Pa. St. 305, 6 L. R. A. 636.

[1] People *v.* County of Tazewell, 22 Ill. 147; City of Pekin *v.* Reynolds, 31 Ill. 529; Sherlock *v.* Village of Winnetka, 68 Ill. 530.

bonds are made payable beyond the limits of the state does not affect their validity, and if the municipality issuing them fails or refuses to pay the interest on the coupons as they become due upon the bonds, at the place designated beyond the state, it is the duty of the holder of the bonds or coupons to present them to the treasurer of the municipality, where in law they would be deemed payable. The place of payment specified in the bonds or coupons is regarded, in such cases, as mere surplusage.[1] In the case cited, Justice Walker, in delivering the opinion of the court, said: "If this coupon had not contained the language, 'at the city of New York,' it would have been a legal instrument, strictly conforming to all the requirements of the law authorizing counties to issue evidences of indebtedness. If, then, this unauthorized portion of the coupon were rejected, it would be in conformity to the law, and for the purpose of upholding it the law will reject that portion as surplusage."

§ 249. **What officers must act.**—The power of municipal officers to issue bonds, whether they act under a general power under the charter of the municipality and issue bonds for general purposes, or act under a special statute granting aid to a railroad, is derived from the same source. The statutes of the state are the sources to which we are to look in order to ascertain their power, and, as a general rule, such authority as we find there vested in them they may exercise, and no more. And every holder of municipal bonds is bound, at his peril, to know the extent of the powers of the officers purporting to bind a municipality by bonds issued in their behalf.

The supreme court of the United States has held that every executive officer, when called on to act in his official capacity, must inquire and determine whether, on the facts, the law requires him to do the act required. The due execution of bonds is an executive act.[2]

Where the law requires bonds of the township to be attested by the county clerk, the signature of the clerk is essential to

[1] Johnson *v.* County of Stark, 24 Ill. 75.

[2] Hoff *v.* Jasper Co., 110 U. S. 53.

the valid execution of them, and bonds executed without his signature are not the bonds of the township.[1]

But where, by a contract of subscription, a township agreed to take stock of a railroad company and pay for it in valid negotiable bonds, and, when the subscription was made, the bonds signed by the presiding justice of the county court alone would have been sufficient, the contract of subscription is not impaired by a law passed afterwards that requires the signature of the clerk of the court to the bond, as well as that of the presiding justice.[2]

In Illinois where a county is organized under the township act, it has been held that the supervisors are the proper officers to issue county bonds.[3]

And after a vote of the township in Illinois it has been held that the supervisors and clerk are the proper authorities to subscribe for the stock of a railroad company, and issue the bonds of the township therefor.[4]

In Missouri the presiding justice of the county court and the clerk of a county were, by the terms of the order of a county court, authorized to execute bonds which would bind the county for the payment, under the law of the state authorizing counties "to fund any and all debts they may owe."[5]

In New Jersey the township committee has no general authority to act for the township, yet where they had executed bonds which the township was authorized to issue for the purpose of raising money to pay bounties, and the township book recited an issue of bonds, "in pursuance of a resolution," etc., and an act of the legislature ratified the proceedings, expressly including the acts and doings of the township committee, it was held that the legislature intended to authorize such execution and issue by the committee.[6]

[1] Bissell *v.* Spring Valley, 110 U. S. 62.

[2] Hoff *v.* Jasper Co., 110 U. S. 53.

[3] County of Kankakee *v.* Ætna Life Ins. Co., 106 U. S. 688.

[4] Walnut *v.* Wade, 103 U. S. 683; Ohio *v.* Frank, 103 U. S. 697.

[5] County of Cass *v.* Shores, 95 U. S. 375.

[6] Middleton *v.* Mullica Tp., 112 U. S. 433.

§ 250. **Doctrine of the supreme court of the United States as to various irregularities.**—The supreme court of the United States has not only held that it is not a valid objection that bonds were made payable beyond the limits of the state, in the absence of express legislative enactment to the contrary, but also that it is not a valid objection that the county judge attested his seal to the bonds out of the state.[1]

Where a subscription to a stock in aid of a railway company was legal, it is immaterial that the bonds were issued at a later date.[2]

Town bonds issued under the laws of Missouri are not invalid because the railroad company to which the subscription was voted was not incorporated until the day of the election.[3]

So it has been held that bonds issued by a county in Missouri are not void in the hands of a *bona fide* purchaser for value, because the railroad company to which the bonds were issued in payment of its capital stock was not created until subsequent to the favorable vote of the qualified voters and the order of subscription.[4]

In New York bonds were not void because, although the written assent of the required number of tax-payers on the assessment roll of 1852 was obtained, they were not issued until after August 1, 1853, when the assessment roll for that year was by law required to be completed.[5]

In New York where an order of the county judge for an issue of town bonds was reversed on *certiorari*, but the town commissioners, after commencement of the proceedings, issued and delivered the bonds to the railroad company with full knowledge of such proceedings, it was held that the bonds were illegal as between the town and the company.[6]

Under the municipal aid act of Alabama it has been held that bonds from which coupons are cut are not void because they were not of the same denomination as those specified in

[1] County of Lynd *v.* The County, 16 Wall. 6.

[2] County of Calloway *v.* Foster, 93 U. S. 567.

[3] County of Cass *v.* Johnson, 95 U. S. 360; County of Cass *v.* Jordan, 95 U. S. 373.

[4] County of Daviess *v.* Huidekoper, 98 U. S. 98.

[5] Scipio *v.* Wright, 101 U. S. 665.

[6] Stewart *v.* Lansing, 104 U. S. 505.

the proposition of the railroad company for subscription, submitted to and voted upon by the county. And bonds issued under the authority of a popular election can not be set aside simply because all that may have been said by interested parties, in public speeches during the canvass which preceded the election, does not turn out to be in every respect true.[1]

Under a statute in Michigan authorizing the issue of bonds in aid of a railroad, which provides for their issue, "within sixty days after" the bonds are voted, it was held that valid bonds may be issued after that time and ante-dated. And under such a statute an affidavit, denying that the bonds were issued within the sixty days, puts in issue the question of their validity if they were issued after that time.[2]

[1] County of Green *v.* Daniel, 102 U. S. 187.

[2] Chickaming *v.* Carpenter, 106 U. S. 663.

CHAPTER XI.

THE NEGOTIABILITY OF BONDS.

§ 251. The doctrine of the supreme court of the United States as to the negotiability of bonds.
252. Negotiability of bonds payable in blank.
253. The words "to bearer" or "order" not essential to negotiability.
254. Negotiability of bonds payable to holder.
§ 255. The amount to be paid must be certain to constitute negotiability.
256. A conditional payment does not destroy negotiability.
257. Municipal bonds, when not commercial paper.
258. Municipal bonds governed by law merchant.

§ 251. The doctrine of the supreme court of the United States as to the negotiability of bonds.—It is the well established doctrine of the supreme court of the United States that municipal bonds with coupons, payable to bearer, are negotiable securities, and pass by delivery, and, in fact, have all the qualities and incidents of commercial paper.

Thus, in 1863 a case arose in the supreme court of the United States from the state of Pennsylvania, involving the validity of certain bonds which had been issued in aid of the Pittsburg and Erie Railroad Company by Mercer county, in that state. The bonds set forth the fact that the county was indebted to said company for the full sum which the county "promises to pay twenty years after date, to said company or bearer, with interest payable semi-annually, etc., upon delivery of the coupons annexed; for which payments well and truly to be made, the faith, credit and property of the county is solemnly pledged, under authority of an act of the assembly," stating the act under which the bonds were issued, and signed under the corporate seal of the county. The supreme court, in an able opinion by Justice Grier, held that this species of bonds is a modern invention, intended to pass by manual

delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by states and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law can not prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability, to suit the necessities and usages of the mercantile and commercial world, is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the usual enterprises of the day, it can not be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, can not be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanction of judicial recognition, not only of this court, but of nearly every state in the Union, is well known and admitted.[1]

In another case, in which the validity of certain bonds issued by the city of Dubuque, Iowa, was brought into question before this court, Justice Swayne, speaking for the court, said: "Bonds and coupons like these, by universal commercial usage and consent, have all the qualities of commercial paper."[2]

§ 252. **Negotiability of bonds payable in blank.**—In this country the fact that the name of the payee is not inserted in

[1] Mercer Co. *v.* Hackett, 1 Wall. 83; White *v.* Vermont, etc., Railroad Co., 21 How. 575.

[2] Gelpcke *v.* Dubuque, 1 Wall. 175; Thompson *v.* Lee Co., 3 Wall. 327; City of Lexington *v.* Butler, 14 Wall. 282; Mayor *v.* Ray, 19 Wall., 468; Humboldt Township *v.* Long, 92 U. S. 642; Roberts *v.* Bolles, 101 U. S. 119; Ottawa *v.* National Bank, 105 U. S. 342.

the bond will not destroy its negotiability, and it seems that when bonds are so issued and delivered in blank the holder may insert his own name.

In 1858 the question as to the negotiability of railroad bonds was before the supreme court of the United States. Bonds had been issued by the Vermont and Massachusetts Railroad Company in regular course of business, and for sufficient consideration, to a citizen of Massachusetts, and were payable in blank, no payee being inserted. The bonds were afterwards sold in open market, and passed from hand to hand by delivery, at prices varying according to the state of the market, and, after passing through several intervening holders, they came into the hands of a citizen from New Hampshire, who brought suit upon the bonds against the railroad company, but before suit was brought, the holder of the bonds filled in the blank by inserting "Selden F. White, or order," the name of the holder of the bonds. This was done without the knowledge or consent of the defendant, the railroad company. The supreme court of the United States held that it was the intention of the company, by issuing the bonds in blank, to make them negotiable to the holder as bearer, and that the holder might fill up the blank with his own name or make them payable to himself or bearer or order. Mr. Justice Nelson, in delivering the opinion of the court, said: "As to the negotiability of this class of securities, when shown to be intended that they should possess this character by the form in which issued, and mode of giving them circulation, we think the usage and practice of the companies themselves and of the capitalists and business men of the country dealing in them, as well as the repeated decision or recognition of the principle by courts and judges of the highest respectability, have settled the question. Indeed, without conceding to them the quality of negotiability, much of the value of these securities in the market, and as a means for furnishing the funds for the accomplishment of many of the greatest and most useful enterprises of the day, would be impaired. Within the last few years, masses of them have gone into general circulation, and in

which capitalists have invested their money; and it is not too much to say, that a great share of the confidence they have acquired, as a desirable security for investment, is attributable to this negotiable quality, as well on account of the facility of passing from hand to hand as the protection afforded to the *bona fide* holder."[1]

In May, 1863, the Milwaukee and St. Paul Railway Company issued coupon bonds, by each of which the company acknowledged its indebtedness to certain persons named, or bearer, in the sum of one thousand dollars, and promised to pay the amount to the bearer on the first day of January, 1893, at the office of the company, in the city of New York, with semi-annual interest at the rate of seven per cent. per annum, on the presentation and surrender of the coupons annexed, as they severally became due. Immediately following this acknowledgment of indebtedness and promise of payment there was in each of the instruments a further agreement of the company to make what is termed "the scrip preferred stock" attached to the bonds full paid stock, at any time within ten days after any dividend shall have been declared and become payable in such preferred stock, upon surrender, in the city of New York, of the bonds and unmatured interest warrants. To each of the bonds there was originally attached, by a pin, the certificates of scrip preferred stock thus referred to, which stated that the complainant was entitled to receive ten shares of full paid preferred stock of the company, designated as "scrip preferred stock;" and that upon the surrender of the certificate and accompanying bond and all unmatured coupons thereon, as provided in the agreement, he should be entitled to receive ten shares of full paid preferred stock. Three of these bonds, with certificates attached, were stolen from the plaintiff, and were taken by the defendants as collateral security for notes discounted by them, without actual notice

[1] White *v.* Vermont & Massachusetts R. R. Co., 21 How. 575; Morris Canal, etc., Co. *v.* Fisher, 1 Stockton 667, 699; Delafield *v.* State of Illinois, 2 Hill (N. Y.) 159, s. c. 8 Paige Ch. 527; Mech. Bank *v.* N. Y. & N. H. R. R. Co., 13 N. Y. 599; Carr *v.* LeFevre, 27 Pa. St. 413; Craig *v.* The City of Vicksburg, 31 Miss. 216; Chapin *v.* The Vermont & Massachusetts R. R. Co., 8 Gray 575; *ante*, § 246.

of any defect in the title of the holder; but the certificates were, at the time, detached from the bonds. The supreme court held that the bonds were negotiable instruments, notwithstanding the agreement respecting the scrip preferred stock contained in them, that agreement being independent of the pecuniary obligation of the company.[1]

§ 253. **The words "to bearer" or "order" not essential to negotiability.**—A case arose in the supreme court of the United States in 1880, from the state of Tennessee, involving the negotiability of county bonds issued to a railroad company. The obligatory part of the bond contained this provision: "Know all men by these presents, that the county of Wilson, in the state of Tennessee, is indebted to the Tennessee and Pacific Railroad Company, or the holder hereof, if this bond is transferred by the signature of the president of said company, at the office of the treasurer of said county, in the city of Lebanon, on the first day of January, 1879, with interest thereon at the rate of six per cent. per annum, on the first day of January and July ensuing the date hereof, until the principal sum is paid, upon the presentation and surrender of the interest warrants hereto attached at the said office of the treasurer of Wilson county, state of Tennessee; this being one of a series of bonds, in all, amounting to three hundred thousand dollars, issued for the stock in the Tennessee and Pacific Railroad Company." It was contended that the bonds were not negotiable because they were not made payable to bearer or order. It was shown that the bonds had been transferred to the National bank of Nashville, Tenn., by the president of the railroad company. The court held that county bonds, payable to a railroad company or holder, if the bonds are transferred by the signature of the president of the company, are negotiable, and after a transfer may be sued upon by the holder. The payment of the bonds to the railroad company or holder was equivalent to making the bonds payable to the company or order, provided the "order" or indorsement was made by the president of the company, and as the bonds contained the in-

[1] Hotchkiss *v.* National Banks, 21 Wall. 354.

dorsement of the president transferring them to bearer, they were held to be negotiable. They were in precisely the same plight, said the court, as a promissory note payable to order and indorsed in blank or to bearer, the title to which passes by mere delivery.[1]

§ 254. **Negotiability of bonds payable to holder.**—Municipal bonds payable to bearer are deemed payable to the holder, and the holder is not regarded as the assignee of the contract, but the holder through transfer by delivery.[2]

Municipal bonds payable to bearer are negotiable by delivery, and in an action thereon the complaint will be sufficient, if it allege that the plaintiff is the owner and holder thereof, and need not show how he acquired his title thereto.[3]

§ 255. **The amount to be paid must be certain to constitute negotiability.**—But certainty in the amount payable is requisite to the negotiability of bonds. Thus, railroad bonds by which the company acknowledges indebtedness to A or bearer, in the sum of so many pounds or so many dollars, without saying which, and payable in New York or New Orleans, the place of payment to be fixed by the president of the company by his indorsement, but the place of payment left blank in the indorsement, have been held by the supreme court of the United States not to be negotiable paper. The uncertainty of the amount payable, in the absence of the required indorsement, is of itself, said Justice Bradley, a defect which deprives these instruments of the character of negotiability.[4]

Mr. Daniel, in his work on Negotiable Instruments, says: "One of the first rules in regard to negotiable paper is that the amount to be paid must be certain, and not be made to depend on a contingency."[5]

§ 256. **A conditional payment does not destroy negotiability.**—Municipal bonds have been held to be negotiable, not-

[1] County of Wilson *v.* National Bank, 103 U. S. 770.

[2] Farr *v.* Town of Lyons, 13 Fed. R. 377.

[3] Gardner *v.* Haney, 86 Ind. 17; Black *v.* Duncan, 60 Ind. 522.

[4] Parsons *v.* Jackson, 99 U. S. 434. See *ante*, § 242.

[5] 1 Daniel on Neg. Inst., § 53.

withstanding they contain the following recital: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through the said township, in pursuance of and in accordance with an act of the legislature of the state of Kansas, entitled 'An Act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25, 1870;' and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt Township, as also its property, revenue and resources is pledged." Relying upon this clause of the certificate, the township contended that the construction of the railroad through the township was a condition upon which the payment was agreed to be made. The supreme court of the United States held that this was not the true construction of the contract. That the construction of the road, as well as the subscription for stock, were mentioned in the recital as the reason why the township entered into the contract, not as conditions upon which its performance was made to depend. It was for the purpose of subscribing, and to aid in the construction of the road, that the bond was given. The words "upon the performance of the said condition" can not then refer to anything mentioned in the recital, for there are no conditions there. A much more reasonable construction is, that they refer to a former part of the bond, where the annual interest is stipulated to be payable at a banker's, "on the presentation and surrender of the respective interest coupons." Such presentation and surrender is the only condition mentioned in the instrument. But the stipulation presents no such contingency as destroys the negotiability of the instrument. It is what is always implied in every promissory note or bill of exchange, that it is to be presented and surrendered when paid. As well might it be said that a note payable upon a demand is payable upon a contingency, and, therefore, non-negotiable, as to affirm that one payable on its presentation and surrender is, for that reason, destitute of negotiability.[1]

[1] Humboldt Tp. *v.* Long, 92 U. S. 642.

§ 257. **Municipal bonds, when not commercial paper.**—Bonds not issued in pursuance of legislative authority, nor in the mode and for the purposes provided by law, possess none of the qualities of commercial paper, but when the municipality is authorized to issue bonds under certain conditions, and the bonds contain recitals of the existence of the necessary conditions, such recitals are usually conclusive in favor of a *bona fide* purchaser.[1]

§ 258. **Municipal bonds governed by law merchant.**—Municipal bonds, drawn payable to bearer, are negotiable as inland bills of exchange, and are, therefore, only payable after they are due, upon presentation at the office of the city treasurer, or at the place where they are made payable. They are governed by the law merchant.[2]

[1] Hopper *v.* Town of Covington, 8 Fed. R. 777, 118 U. S. 148.

[2] City of Bloomington *v.* Smith, 123 Ind. 41; Board *v.* Bright, 18 Ind. 93; New Albany, etc., Co. *v.* Smith, 23 Ind. 353; Gardner *v.* Haney, 86 Ind. 17.

CHAPTER XII.

THE MEDIUM OF PAYMENT.

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Gold and Silver Contracts.

§ 259. **General powers of congress.**—The provisions of the constitution of the United States which relate to the legislative function of the government may be divided into three classes:

1. Those which confer legislative powers on congress.

2. Those which prohibit the exercise of legislative powers by congress.

3. Those which prohibit the states from exercising certain legislative powers.

The powers conferred on congress may be subdivided into two classes:

(*a*) Express powers. Among the express powers of congress is the power to borrow money and to coin money and to regulate the value thereof.

(*b*) Implied powers. The implied powers of legislation are based largely on that general provision of article one, section eight, of the constitution of the United States which declares that congress shall have power, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

§ 260. **Prohibition on the powers of the states.**—Article one, section ten, of the constitution of the United States, among other prohibitions on the powers of the states, declares: "No state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, or pass any law impairing the obligations of contracts." Hence, the constitution of the United States confers upon congress the express and sole power to coin money and regulate the value thereof, and prohibits any state from coining money or making anything but gold and silver coin a tender in payment of debts; thus removing the whole power from the domain of state legislation.

Justice Miller, in the dissenting opinion in Hepburn *v.* Griswold, said: "It has been strongly argued by many able jurists that these latter clauses, fairly construed, confer the power to make the securities of the United States a lawful tender in payment of debts. While I am not able to see in them standing alone a sufficient warrant for the exercise of this power, they are not without decided weight when we come to consider the question of the existence of this power, as one necessary and proper for carrying into execution other admitted powers of the government; for they show that, so far as the framers of the constitution did go in granting express power over the lawful money of the country, it was confided to congress and for-

bidden to the states; and it is no unreasonable inference, that if it should be found necessary in carrying into effect some of the powers of the government essential to its successful operation, to make its securities perform the office of money in the payment of debts, such legislation would be in harmony with the power over money granted in express terms.'"[1]

§ 261. **The power of congress to borrow money includes the power to issue treasury notes or other obligations of the United States in any appropriate form.**—Article one, section eight, of the constitution of the United States, among other things, ordains that congress shall have power "to borrow money on the credit of the United States." The words to "borrow money," as used in the constitution to designate a power vested in the national government, for the safety and welfare of the whole people, are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute, or in an authority conferred, by law or by contract, upon trustees or agents for private purposes. The power "to borrow money on the credit of the United States" is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form of stock, bonds, bills or notes. Thus, a case arose in the supreme court of the United States in 1884, from the circuit court of the United States from the southern district of New York, involving the single question: Whether notes of the United States, issued in time of war, under acts of congress declaring them to be a legal tender in payment of private debts, and afterwards in time of peace redeemed and paid in gold coin at the treasury, and then re-issued under the act of 1878, can, under the constitution of the United States, be a legal tender in payment of such debts. Upon full consideration of the case the court held that congress has the constitutional power to make the treasury notes of the United States a legal tender in

[1] Hepburn *v.* Griswold, 8 Wall. 603.

payment of private debts, in time of peace as well as in time of war.[1]

Mr. Justice Gray, in delivering the opinion of the court, used the following language: "It appears to us to follow, as a logical and necessary consequence, that congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power as incident to the power of borrowing and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to the sovereignty, in Europe and America, at the time of the framing and adoption of the constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of the powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the emperor of Austria, as king of Hungary, obtained from the English court of chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary.[2] The power of issuing bills of credit and making them, at the discretion of the legislature, a tender in payment of private debts, has long been exercised in this country by the several colonies and states; and during the Revolutionary War the states, upon the recommendation of the Congress of the Confederation, had made bills issued by congress a legal tender.[3] The exercise of this power not being prohibited to congress by the constitution, it is included in

[1] Juilliard *v.* Greenman, 110 U. S. 421; Legal Tender Cases, 12 Wall. 457; Dooley *v.* Smith, 13 Wall. 604; Railroad Co. *v.* Johnson, 15 Wall. 195; Maryland *v.* Railroad Co., 22 Wall. 105.

[2] Emperor of Austria *v.* Day, 2 Giff. 628, and 3 DeG. F. & J. 217.

[3] See Craig *v.* Mo., 4 Pet. 410; Briscoe *v.* Bank of The Commonwealth, 11 Pet. 257, 313, 334, 336; Legal Tender Cases, 12 Wall. 457, Phillips American Paper Currency *passim*.

the power expressly granted to borrow money on the credit of the United States. This position is fortified by the fact that congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating the value of foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of these notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful for all purposes, as regards the national government or private individuals. The power of making the notes of the United States a legal tender in payment of private debts being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a fair and just interpretation of the whole constitution a particular power or authority appears to be vested in congress, it is no constitutional objection to its existence or its exercise that the property or the contracts of individuals may be incidentally affected. The decisions of this court, already cited, afford several examples of this."

§ 262. **The legal tender act.**—Congress, on February 25, 1863, passed what is known as the legal tender act, providing for the issue of treasury notes and declaring that they "should be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports, and of all claims and demands against the United States, of every kind whatsoever, except upon interest upon bonds and notes, which shall be paid in coin; and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest aforesaid."[1]

[1] 12 Stat. at Large, 345.

§ 263. **Constitutionality of legal tender act.**—The first case involving the constitutionality of the legal tender act arose in the supreme court of the United States in 1869.[1]

In this case the supreme court held that the making of notes or bills of credit a legal tender in payment of pre-existing debts is not a means appropriate, plainly adapted or really calculated to carry into effect any express power vested in congress, is inconsistent with the spirit of the constitution, and is, therefore, prohibited by the constitution. The clause in the acts of 1862 and 1863, which makes United States notes a legal tender in payment of all debts, public and private, is, so far as it applies to debts contracted before the passage of those acts, unwarranted by the constitution. Hence, prior to the 25th of February, 1862, all contracts for the payment of money not expressly stipulating otherwise, were, in legal effect and universal understanding, contracts for the payment of coin, and, under the constitution, the parties to such contracts are respectively entitled to demand and bound to pay the sums due, according to their terms, in coin, notwithstanding the clause in that act, and subsequent acts of like tenor, which make United States notes as legal tender in payment of such debts. This decision of the supreme court was reversed in the famous legal tender cases of Knox *v.* Lee and Parker *v.* Davis, in which the questions here involved were elaborately argued, and the doctrine announced in Hepburn *v.* Griswold, so far as it held the legal tender acts unwarranted by the constitution, and so far as they apply to contracts made before their enactment, was overruled. In these cases the supreme court held that the acts of congress known as The Legal Tender Acts are constitutional when applied to contracts made before their passage as well as to debts contracted since their enactment.[2]

§ 264. **The doctrine enunciated by the majority court in the legal tender cases criticised by Chief Justice Chase.**—Chief Justice Chase, and Justices Field and Clifford dissented from the argument and conclusion in the opinion of the majority of the

[1] Hepburn *v.* Griswold, 8 Wall. 603. [2] Knox *v.* Lee and Parker *v.* Davis, 12 Wall. 457.

court. Chief Justice Chase, in his dissenting opinion, said: "A majority of the court, five to four in the opinion which was just read, reverses the judgment rendered by the former majority of five to three, in pursuance of an opinion formed after repeated arguments, at successive terms, and careful consideration, and declares the legal tender clause to be constitutional; that is to say, that an act of congress making promises to pay dollars legal tender as coin dollars in payment of pre-existing debts is a means appropriate and plainly adapted to the exercise of powers expressly granted by the constitution, and not prohibited itself by the constitution but consistent with its letter and spirit. And this reversal, unprecedented in the history of the court, has been produced by no change in the opinions of those who concurred in the former judgment. One closed an honorable judicial career by resignation after the case had been decided (27th November, 1869), after the opinion had been read and agreed to in conference (29th January, 1870), and after the day when it would have been delivered in court (31st January, 1870), had not the delivery been postponed for a week to give time for the preparation of the dissenting opinion. The court was then full, but the vacancy caused by the resignation of Justice Grier having been subsequently filled, and an additional justice having been appointed under the act increasing the number of judges to nine, which took effect on the first Monday of December, 1869, the then majority find themselves in a minority of the court, as now constituted, upon the question. Their convictions, however, remain unchanged. We adhere to the opinion pronounced in Hepburn *v.* Griswold. Reflection has only wrought a firmer belief in the soundness of the constitutional doctrines maintained and in the importance of them to the country."[1]

§ 265. **Payment must be made according to the terms of the contract.**—A contract to pay a certain number of dollars in gold and silver coin is an agreement to deliver a certain weight of standard gold and silver coin, made legal tender by statute. Such contract can not be satisfied by a tender of

[1] Knox *v.* Lee and Parker *v.* Davis, 12 Wall. 457.

United States notes. Express contracts to pay coin dollars can only be satisfied by the payment of coin dollars. And when contracts made payable in coin are sued upon, judgments may be entered for coin dollars and parts of dollars. Hence, the payment of a bond or note must be made according to the terms of the contract.[1]

But where the contract is for payment in coin, or "its equivalent," it is not necessarily payable in coin alone, and judgment should be rendered according to the contract.[2]

§ 266. **Illustration.**—Thus, in 1868, a case came to the supreme court of the United States from the state of New York, in which this subject was under consideration. The facts as presented by the record were these: In December, 1851, one Chritian Metz, having borrowed of Frederick Bronson, executor of Arthur Bronson, one thousand four hundred dollars, executed his bond for the repayment to Bronson of the principal sum borrowed, on the 18th day of January, 1857, in gold and silver coin, lawful money of the United States, with interest also in coin, until such repayment, at the yearly rate of seven per cent. To secure these payments according to the bond, at such place as Bronson might appoint, or in default of such appointment at the Merchants' Bank of New York, Metz executed a mortgage upon certain real property, which was afterwards conveyed to Rodes, who assumed to pay the mortgage debt, and did, in fact, pay the interest until and including the first day of January, 1864. Subsequently, in January, 1865, there having been no demand of payment, nor

[1] Bronson *v.* Rodes, 7 Wall. 229; Butler *v.* Horwitz, 7 Wall. 258. See, also, Trebilcock *v.* Wilson, 12 Wall. 687; Forbes *v.* Murray, 3 Ben. (U. S.) 497; Belford *v.* Woodward, 158 Ill. 122; Gregory *v.* Morris, 96 U. S. 619; Sheehy *v.* Chalmers (Cal.), 36 Pac. R. 514; Hittson *v.* Davenport, 4 Colo. 169; Chesapeake Bank *v.* Swain, 29 Md. 483; Phillips *v.* Dugan, 21 Ohio St. 466, 8 Am. R. 66.

[2] Wells, Fargo Co. *v.* Van Sickle, 6 Nev. 45; Mitchell *v.* Henderson, 63 N. Car. 643; Lane *v.* Gluckauf, 28 Cal. 288, 87 Am. Dec. 121. See, also, Atkinson *v.* Lanier, 69 Ga. 460; Killough *v.* Alford, 32 Tex. 457, 5 Am. R. 249; Church *v.* Howard, 17 Hun 5; Wills *v.* Wilson, 3 Ore. 308. But compare Reese *v.* Stearns, 29 Cal. 273; Churchman *v.* Martin, 54 Ind. 380; Bond *v.* Greenwald, 4 Heisk. 453.

any appointment of a place of payment by Bronson, Rodes tendered to him United States notes to the amount of one thousand five hundred and seven dollars, a sum nominally equal to the principal and interest due upon the bond and mortgage. At that time one dollar in coin was equivalent in market value to two dollars and twenty-five cents in United States notes. This tender was refused, whereupon Rodes deposited the United States notes in the Merchants' Bank to the credit of Bronson, and filed his bill in equity, praying that the mortgaged premises might be relieved from the lien of the mortgage, and that Bronson might be compelled to execute and deliver to him an acknowledgment of the full satisfaction and discharge of the mortgage debt. The bill was dismissed by the supreme court, sitting in Erie county, but on appeal to the supreme court in general term, the decree of dismissal was reversed, and a decree was entered adjudging that the mortgage had been satisfied by the tender, and directing Bronson to satisfy the same of record; and this decree was affirmed by the court of appeals.

The case was appealed to the supreme court of the United States and the question considered by that court was this: Was Bronson bound by law to accept from Rodes United States notes equal in nominal amount to the sum due as full performance and satisfaction of a contract which stipulated for the payment of that sum, "in gold and silver coin, lawful money of the United States?" The supreme court, in an able opinion, by Chief Justice Chase, said: "That a contract to pay a certain number of dollars in gold or silver coin is nothing less than an agreement to deliver a certain weight of standard gold to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight." It is not distinguishable, said the learned chief justice, in principle, from a contract to deliver an equal weight of bullion of equal fineness. "It is distinguishable, in circumstances, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in case of bullion by assay and the scales; while in the case of coin, it may be ascertained by count. * * * There were two descriptions of money in use

at the time the tender under consideration was made, both authorized by law and both made legal tender in payment. The statute denomination of two descriptions was dollars; but they were essentially unlike in nature. The coined dollar, was, as we have said, a piece of gold or silver of a prescribed degree of purity, weighing a prescribed number of grains. The note dollar was a promise to pay a coin dollar; but it was not a promise to pay on demand nor at any fixed time, nor was it in fact convertible into a coin dollar. It was impossible, in the nature of things, that these two dollars should be equivalents of each other, nor was there anything in the currency acts purporting to make them such. How far they were at that time from being actual equivalents has been already stated. If, then, no express provision to the contrary be found in the acts of congress, it is a just if not a necessary inference from the fact that both descriptions of money were issued by the same government that contracts to pay in either were equally sanctioned by law. It is, indeed, difficult to see how any question can be made on this point. Doubt concerning it can only spring from that confusion of ideas which always attends the introduction of varying and uncertain measures of value into circulation as money. * * * When, therefore, two descriptions of money are sanctioned by law, both expressed in dollars and both made current in payment, it is necessary, in order to avoid ambiguities and prevent a failure of justice, to regard this regulation as applicable alike to both. When, therefore, contracts made payable in coin are sued upon, judgments may be entered for coin dollars and parts of coin dollars; and when contracts have been made payable in dollars generally, without specifying in what description of currency payment is made, judgment may be made generally, without such specification."[1]

§ 267. **Obligations payable "in specie."**—In a case which arose in the supreme court of the United States, in 1871, from the state of Iowa, the principal question presented for the consideration of the court was, whether a promissory note of an

[1] Bronson *v.* Rodes, 7 Wall. (U. S.) 229.

individual, payable by its terms "in specie," can be satisfied, against the will of the holder, by the tender of notes of the United States, declared by the act of congress of February 25, 1862, to be a legal tender in payment of debt. The court held that where a note is for dollars, payable by its terms in specie, the terms "in specie" are merely descriptive of the kind of dollars current, recognized by law; and mean that the designated number of dollars shall be paid in so many gold or silver dollars of the United States. Hence the act of February 25, 1862, in declaring that the notes of the United States shall be lawful money and a legal tender for all debts, only applies to debts which are payable in money generally, and not to obligations payable in commodities or obligations of any other kind.[1]

§ 268. **Payment in gold, when not required.**—An undertaking to pay an obligation in gold can not be inferred from anything outside of the instrument.

The supreme court of the United States has declared this to be the rule in regard to the payment, by a railroad company, of interest on state bonds payable in London, issued in aid of the railroad, the interest upon which it had agreed to pay to the state. And the fact that the company did pay the state's interest in sterling funds in London, for several years, did not change the rule or the construction of the contract.[2]

§ 269. **When payment in gold may be implied.**—An undertaking to pay in gold may, however, be implied in or from the contract itself and be as obligatory as if in express words, but the implication must be from the words of the contract and not from the expectation of the parties.[3]

[1] Trebilcock *v.* Wilson, 12 Wall. 687; Bronson *v.* Rodes, 7 Wall. 229. See, also, Walkup *v.* Houston, 65 N. Car. 501; and compare Townsend *v.* Jennison, 44 Vt. 315.

[2] Maryland *v.* Railroad Co., 22 Wall. 105; Bronson *v.* Rodes, 7 Wall. 229; Trebilcock *v.* Wilson, 12 Wall. 687. See, also, Curiac *v.* Abadie, 25 Cal. 502.

[3] Maryland *v.* Railroad Co., 22 Wall. 105. But see Hull *v.* Kohlsaat, 36 Ill. 130; Luling *v.* Atlantic, etc., Co., 51 N. Y. 207, for cases in which it was held that no such implication arose.

§ 270. **What constitutes sufficient payment in the absence of fraud.**—Acceptance of payment of treasury notes in legal tender notes in lieu of gold, where there is neither deception, mistake nor undue advantage, and the surrender of the treasury notes to the United States, is a waiver of a claim antecedently made for payment in gold and amounts to a full discharge of the same, independently of the question whether the notes accepted in payment are or are not a legal tender.

Hence, a protest, under such circumstances, is utterly insufficient to qualify the effect of the waiver evidenced by the acceptance of what was offered in payment of the treasury notes in lieu of gold and their surrender.[1]

Gold Clause in Bonds and Other Obligations.

§ 271. **The power to borrow money and issue bonds includes the power to make them payable in gold.**—The supreme court of the United States has decided in a very recent case that the power to borrow gold coin and make bonds payable in the same medium is included in the power conferred by statute upon a public corporation to borrow money and issue negotiable bonds therefor. But a bond reciting an indebtedness for a specified number of dollars in gold coin, "which said sum" it promises to pay (without specifying the medium of payment), while an interest coupon attached is declared payable in currency, is legally payable in money of the United States whatever its description, and not merely in gold coin.

Mr. Justice Field, in concurring in the decision of the court, says: "In my judgment no transaction of commerce or business or obligation for the payment of money that is not immoral in its character and which is not, in its manifest purpose, detrimental to the peace, good order and general interest of society, can be declared or held to be invalid because enforced or made payable in gold coin or currency when it is established or recognized by the government. And any acts by state authority impairing or lessening the validity or nego-

[1] Savage *v.* United States, 92 U. S. (2 Otto) 382.

tiability of obligations thus made payable in gold coin are violative of the laws and constitution of the United States.''[1]

So, in a recent case in the United States circuit court for the district of Washington, involving the question, the court held that the authority given by the laws of the state to municipal corporations to provide means for constructing works of public utility, by issuing and selling negotiable bonds, includes authority to make such bonds payable in gold coin of the present standard weight and fineness. Judge Hanford said: ''True, if gold coin of the present standard advances in value, and if the city shall be hereafter compelled to receive its income in money of less value, a debt under such a contract may be found to exceed the legal limit. But there is no greater probability of such changes than there is of assessments being made by persons whose judgment may require them to greatly undervalue property subject to taxation as compared with appraisements made by the present officials, and in that way change the ratio of city indebtedness to the assessed value of property subject to taxation. Application of the rule contended for by counsel for complainant would require the city to not only keep within the limits, but to maintain a considerable margin to avoid possibility of an excess of debt consequent upon changes in standards of value. Such a policy in the conduct of municipal business may be wise, but tax-payers can not by legal process compel the city officials to follow it. Whether or not a contemplated debt is prohibited by reason of the amount being in excess of the legal limit can only be determined by computing according to existing standards.''[2]

§ 272. **The doctrine of implied power to make bonds payable in gold.**—Express and general power to issue negotiable bonds, in the absence of constitutional or legislative restrictions, carries the implied or incidental power to make them payable in the currency which is constitutionally a legal tender, or payable in a particular coin which constitutes the legal and com-

[1] Woodruff *v.* State of Mississippi, 162 U. S. 291, 16 Sup. Ct. R. 820.

[2] Moore *v.* City of Walla Walla, 60 Fed. R. 961.

mercial standard by which the value of other kinds of currency is measured.[1]

§ 273. **The doctrine in Ohio.**—The revised statutes of Ohio authorized the sinking fund commissioners in cities of the first class to issue bonds, "to an aggregate amount not exceeding twenty-six million dollars," for the purpose of refunding the bonded debt. It was held that this does not impliedly authorize the commissioners to issue gold bonds, for the reason that it was not necessary in order to sell the bonds that they should be made payable in gold.[2]

§ 274. **The doctrine in Washington.**—In a recent case the supreme court of Washington has held that municipal corporations authorized to issue bonds to fund their indebtedness have implied authority to contract for the payment of the bonds in gold, especially where, at the time the legislature granted such power, it was the custom to make such bonds so payable.[3]

§ 275. **The terms of the statute must be strictly followed.**—But, when the statute prescribes the kind of currency or money in which bonds shall be made payable, they can not be made payable in different kinds of currency or money. For example, where a statute provided that the bonds shall be made payable "in gold coin, or lawful money of the United States," it was held that a city was unauthorized to issue bonds and make them payable "in gold coin of the United States of the present standard of weight and fineness."[4]

[1] Judson *v.* City of Bessemer, 87 Ala. 240, 6 So. R. 267. But see Woodruff *v.* State, 66 Miss. 298, reversed, however, by the supreme court of the United States in 162 U. S. 299.

[2] City of Cincinnati *v.* Anderson, 10 Ohio Circuit Ct. R. 265, 3 Ohio Dec. 406.

[3] Packwood *v.* Kittitas Co., 15 Wash. 88, 45 Pac. R. 640.

[4] Skinner *v.* City of Santa Rosa, 107 Cal. 464, 40 Pac. R. 742. But in the more recent case of Murphy *v.* San Luis Obispo, 119 Cal. 624, 48 Pac. R. 974, 39 L. R. A. 444, the same court holds that, under such amendment, the municipality might determine in advance whether the bonds should be payable specifically in gold coin, or generally in lawful money of the United States.

§ 276. **Illustration.**—Thus, the city of Santa Rosa, California, passed an ordinance authorizing the issue of certain bonds of the city for the purpose of constructing a system of waterworks and other public improvements. The ordinance provided, among other things, that the bonds to be issued should bear interest at the rate of four per cent. per annum, and the principal and interest should be payable "in gold coin or lawful money of the United States." The statute under which the ordinance was passed, and the bonds were to be issued, was the act approved March 19, 1889, and as amended by the act of the legislature of 1893. The statute of 1889 made no provision as to the kind of money or currency in which the bonds issued by the municipality should be made payable. But the statute, as amended in 1893, contained, among other things, this provision: "That such bonds shall be payable in gold coin or lawful money of the United States." The city being unable to negotiate the bonds, for the reason that they were made payable in gold coin or lawful money of the United States, passed a new ordinance rescinding the former ordinance, and made the bonds payable at a New York bank "in gold coin of the United States, * * * of the present standard of weight and fineness, with interest at four per cent., payable semi-annually, in like gold coin." The supreme court of California held that, under the statutes of that state, prior to the amendment of 1893, the power to make the bonds payable in gold coin of the present standard of weight and fineness, "or in any other kind of coin or currency," could not be controverted. There was no restriction. The power to determine that question was as ample as that of a natural person to stipulate in what his personal obligations should be paid. The amendment of the statute in 1893, which provided, among other things, that the bonds should be made payable in gold coin or lawful money of the United States, must, therefore, have been intended to restrict that power, and this was done by expressly stating the kind of money in which they 'shall be' made payable. Whether the increased value of the bonds, caused by the stipulation that they shall be paid in gold coin of the present standard of weight and fineness, would equal or

exceed any probable appreciation of gold, can not control the express provisions of the statute in that regard."[1]

§ 277. **In what medium bonds are payable where the statute is silent.**—Where the statute is silent a municipality authorized to issue and negotiate the sale of bonds may make them payable "in gold coin of the present standard of weight and fineness."

Thus, by the provision of an act of the legislature of Kentucky approved March 30, 1880, the commissioners of the sinking fund of the city of Louisville were charged with the payment of the floating indebtedness of that city existing on the first day of January, 1879; and for the purpose of paying the same the general council of the city was authorized and directed to cause to be issued and turned over to said commissioners, for sale, the coupon bonds of said city to the amount of one million dollars, bearing interest at the rate of five per cent. per annum, one-half of said bonds to be so issued that they might be called in and paid off at any time after ten years from their date, and the other half at any time after twenty years from that date. The bonds, both principal and interest, were made payable in gold coin of the United States. The act authorizing the issue of the bonds contained no provision as to the kind of currency or money in which they were to be made payable. In an action by the commissioners of the sinking fund of the city of Louisville against Farson, Leach & Co., to enforce a contract by defendants to purchase an entire issue of city bonds issued for the purpose of retiring other bonds which had been previously issued and sold for the payment of the floating indebtedness of the city, one of the grounds upon which it was claimed that the bonds were invalid was the fact that they were made payable, both principal and interest, in gold coin of the United States. The court of appeals held that the bonds were not void because the principal and interest were made payable in gold coin of the United States, notwithstanding the act authorizing their issue and sale was silent as

[1] Skinner *v.* Santa Rosa, 40 Pac. R. 167 Cal. 464, 742 (1895). Murphy *v.* San Luis Obispo, 48 Pac. R. 974, 119 Cal, 624, 39 L. R. A. 444. But, see

to the medium in which they were to be made payable. Justice East, in delivering the opinion of the court, said: "Looking now at the power granted in the case before us, and the objects and purposes of the same, we find that they were, among other things, and mainly, to issue its negotiable securities, running over a period of twenty years for the purpose of borrowing money by the sale thereof at their face value and carrying a low rate of interest. These bonds were to be offered on a market in which there is current more than one circulating medium but one which is regarded as more stable and less subject to fluctuations than any other, which is the recognized standard of value, and which is the equivalent of and corresponds in value with that which the borrower is to receive from its bonds. Can there be any legal reason why the borrower, in case it should seem, in the exercise of a sound discretion, both prudent and advantageous to stipulate for the payment of the loan in that particular medium of circulation, so that the exact measure of the contract—what is to be paid by the borrower on the one hand, and what is to be received by the lender, on the other—may be fixed and understood by both the contracting parties, should not be allowed to so contract? It seems to us, that this is purely a matter of contract which should be and is entrusted to the discretion of the borrower, who is then authorized to go into the open market to negotiate the desired loan, and who might under some circumstances be seriously embarrassed, or possibly rendered wholly unable to negotiate his security, if denied this privilege of contracting as to these details, as an individual might do. We, therefore, see no valid objection to these bonds by reason of their having been made payable in gold coin."[1]

§ 278. **The acceptance of a depreciated currency by a creditor extinguishes the debt.**—Where a creditor accepts a depreciated currency in full satisfaction of his debt, or any other currency than gold when the contract is specifically made payable in gold, he can not by protesting accept the medium of

[1] Farson, Leach & Co. *v.* Board of Sinking Fund of City of Louisville (Ky.), 30 S. W. R. 17, 97 Ky. 119.

payment tendered, and after the acceptance of such money maintain an action to recover the difference in value between it and gold. Thus, where certain municipal warrants were made payable in gold coin, and the holders thereof accepted treasury notes at par in payment, though protesting at the time against payment in that currency, and surrendered the warrants, it was held that they could not afterwards recover the difference in value between the treasury notes and the coin.[1]

If a debtor tender gold or silver coin on a contract payable in currency, without any agreement as to the rate at which it is to be taken, he can not afterwards require it to be applied otherwise than dollar for dollar.[2]

The supreme court of Illinois has held that a promissory note executed subsequent to the passage of the legal tender act of 1862, payable in American gold, is not discharged by a tender of United States Treasury notes.[3]

But it has been held that a promissory note payable in "gold coin" or the equivalent thereof in United States legal tender notes, "is completely dischargeable by a payment in legal tender notes, dollar for dollar."[4]

[1] Gillman *v.* County of Douglass, 6 Nev. 27; Pollard *v.* City of Pleasant Hill, 3 Dillon 195.

[2] Busch *v.* Baldrey, 11 Allen 367.

[3] McGoon *v.* Shirk, 54 Ill. 408, 5 Am. R. 122.

[4] Killough *v.* Alfred, 32 Tex. 457, s. c. 5 Am. R. 249; Wood *v.* Bullens, 6 Allen 516; Wilson *v.* Morgan, 1 Abb. Pr. N. S. 174, s. c. 30 How, Pr. 386; Kimpton *v.* Bronson, 45 Barb. 618; Murray *v.* Gale, 5 Abb. Pr. N. S. 236, s. c. Barb. 247, 47 Barb. 484, 33 How. Pr. 90.

CHAPTER XIII.

REGISTRATION, GUARANTY AND SALE OF BONDS.

§ 279. As to the object of the registration of bonds.
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281. When certificate of registration deemed conclusive.
282. Certificate of registration does not cover matters of law.
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294. Sale of unauthorized bonds.
295. Municipalities must account for benefits received from the sale of bonds.

§ 279. **As to the object of registration of bonds.**—The history of the issue of municipal bonds shows that conditions imposed by law requiring a popular vote, or condition in the propositions submitted to the voters, intended to prevent fraud and secure the actual building and completion of railroads, have been often evaded and bonds issued without compliance therewith. Such bonds, when negotiated for value, the courts, as we have seen, have held to be binding. To prevent such improper or improvident issue of bonds in the future the legislatures of some of the states have passed acts requiring all bonds to be registered with one of the executive departments of the state before they are issued or negotiated. Thus, in 1872, the legislature of Missouri passed an act which provided that, "before any bond, hereafter issued by any county, * * * shall obtain validity or be negotiated," it must be first regis-

tered by the state auditor, who shall certify thereon that all conditions precedent required by law, and by the contract under which the bonds were required to be issued, have been complied with.

A case arose in the United States circuit court for the district of Missouri in 1876, involving the construction of this statute, where it appeared that bonds were signed, sealed and issued in the manner above appearing after such statute went into effect, and were antedated to a date prior to the passage of that enactment. In point of fact the conditions on which the bonds had been voted had not been fully complied with; and hence they could not have been, and were not, certified by the auditor as registered bonds. The bonds found their way into the hands of an innocent holder for value, who did not know that the bonds bore a false date. The circuit court held that the bonds could not be enforced, and that the county was not estopped to set up the defense, a decision which necessarily implied a distinction between such a case and those in which the supreme court of the United States had held that the county or municipality could not visit the frauds of their officers upon innocent holders of bonds.

This same case was before the supreme court of the United States, and the decision of the circuit court was affirmed. The supreme court held that this act applies to bonds issued under the township aid law.[2]

Municipal bonds bearing date November 1, 1889, due in twenty years, drawing interest at the rate of six per cent. per annum, payable semi-annually, evidenced by coupons maturing May 1, 1890, and each six months thereafter, issued to aid in the construction of a railroad, were deposited with the auditor of public accounts on the 21st of December, 1889, for certification and registration. The auditor was prevented by injunction proceedings from registering and certifying the bonds until January 1, 1891, at which time they were registered and certified. It was held by the supreme court of Nebraska, that as a matter of law the bonds were registered and

[1] Anthony *v.* Jasper Co., 4 Dillon 136.

[2] Anthony *v.* County of Jasper, 101 U. S. 693.

certified on December 21, 1889, as taxes levied in counties under township organization became due on the 1st day of October after their levy, under the statutes of that state, and hence the auditor, when he registered said bonds, should have detached therefrom the coupons thereon which, by their terms, matured prior to October 1, 1890. It was also held that the object of this law was to prevent the municipalities of the state from executing and putting upon the market their obligations for the payment of money which would, by their terms, mature before a tax could be legally levied and become due for the payment of the same.[1]

§ 280. **What constitutes registration.**—When the law requires municipal bonds to be registered by the auditor of the state and that he shall, within ten days thereafter, notify the officers issuing the same of such registration, which fact shall be entered by such officer in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds; without a compliance with these requisitions the bonds are not registered bonds of the municipality, nor entitled as such to the benefits of the act.[2]

Although no registration of the bonds was made in the office of the auditor of state, if the auditor's certificate of registration appears upon the bond, the supreme court of the United States has held it to be sufficient within the meaning of the Kansas statute.[3]

When the law of the state provides for registry of municipal bonds and a certificate thereof, such certificate is generally sufficient evidence to a purchaser of the existence of those facts upon which alone bonds can be registered.[4]

Bonds issued by a duly organized county of Kansas to build a court-house, reciting a legal vote for their issue, and having the certificate of the auditor of the state to their issue, genu-

[1] Brinkworth *v.* Brable, 45 Neb. 647; Young *v.* Clarendon Tp., 132 U. S. 340; Marsh *v.* Fulton Co., 10 Wall. 676.

[2] Bissell *v.* Spring Valley Tp., 110 U. S. 162.

[3] Township of Rock Creek *v.* Strong, 96 U. S. 271.

[4] City of Cairo *v.* Zane, 149 U. S. 122, 13 Sup. Ct. R. 803. See, also, Town of Prairie *v.* Lloyd, 97 Ill. 179.

ineness and registry in accordance with the state law, are valid in the hands of *bona fide* purchasers for value before maturity.[1]

§ 281. **When certificate of registration deemed conclusive.**— The act of the legislature of Kansas of 1872, in relation to the registration of bonds, contained this provision: "Within thirty days after the delivery of such bonds, the holder thereof shall present the same to the auditor of state for registration and the auditor shall, upon being satisfied that such bonds were issued according to the provisions of this act, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued, that the signatures thereto are genuine, and that such bonds have been registered in his office according to law, for which registration and certificate the auditor shall be entitled to a fee of one dollar for each bond so registered, to be paid by the holder thereof." The supreme court of the United States in construing this act held that the legislature of Kansas conferred upon the auditor of state full authority to ascertain and determine whether bonds presented for registration have been issued in accordance with the statute, and if satisfied such is a fact, made it his duty to certify upon the bond that they have been regularly and legally issued; and that bonds executed under the act could be registered and issued, when the subscription was payable immediately and without conditions, without their being in the first instance delivered to the treasurer of state, and by him delivered to the party entitled thereto. Where such bonds do not, upon their face, indicate that they were delivered upon the performance of certain conditions, but are made payable unconditionally, the county is estopped, as against the *bona fide* purchaser, to deny that they are of the class which might have been delivered at once, and without going through the hands of the state treasurer, to the auditor

[1] Harper Co., etc., *v.* Rose, 140 U. S. 71. Compare Citizens' Sav., etc., Assn. *v.* Perry County, 156 U. S. 692, 15 Sup. Ct. R. 547.

of state, and being registered and certified as being regularly and legally issued. In such a case the action and certificate of the auditor of state must be deemed conclusive evidence, as between the county and *bona fide* purchasers, that the bonds were regularly and legally issued, and, therefore, negotiable in the fullest sense of that word.[1]

§ 282. **Certificate of registration does not cover matters of law.**—The constitution of Nebraska contains a provision that requires, as essential to the validity of municipal bonds, an indorsement thereon of a certificate signed by the secretary of state and the auditor of state, showing that the same is issued in pursuance of law. The supreme court of the United States, in construing this provision of the constitution, declared that no conclusive effect is given by the constitution or the statute to this registration or to these certificates, and in the consideration the question of estoppel, they may be laid out of view. In any event, they could not be considered as more comprehensive or efficacious than the statements contained in the body of the bonds, and verified by the signature of the county officers and the seal of the county, except as additional steps, required to be taken in the process of issuing the bonds, and rendered necessary to their validity. This does not extend to or cover matters of law. All parties are equally bound to know the law, and a certificate reciting the actual facts, and that thereby the bonds are conformable to the law, when, judicially speaking, they are not, will not make them so; nor can it work an estoppel upon the county to claim the protection of the law. Otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself.[2]

In 1872 Oxford township, Kansas, issued bonds for the pur-

[1] Lewis *v.* Commissioners of Barbour Co., 105 U. S. 739, distinguished, however, in German Sav. Bank *v.* Franklin County, 128 U. S. 526, 9 Sup. Ct. R. 159.

[2] Dixon Co. *v.* Field, 111 U. S. 83.

pose of aiding in a bridge across the Arkansas river at the town of Oxford, in said township. The bonds were issued in pursuance to an act of the legislature approved March 1, 1872, which authorized the trustee, treasurer and clerk of Oxford township, or any two of them, to issue the bonds of the township to the amount of ten thousand dollars, for the purpose of aiding in building such bridge. The bonds were registered in pursuance to the act of March 2, 1872, which provides that the holder of bonds issued under it shall, within thirty days after their delivery, present them to the auditor of state for registration, and that he shall, on being satisfied that the bonds have been issued according to the provisions of the act, and that the signatures thereto of the officers signing the same are genuine, register them in a book, "and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued; that the signatures thereto are genuine, and that such bonds have been registered in his office according to law." In a suit upon the bonds, it was shown that each of the bonds had indorsed on it a certificate under the hand and seal of the office of the auditor of the state of Kansas, dated April 25, 1872, certifying that it "has been regularly and legally issued; that the signatures were genuine, and that such bond has been duly registered" in this office, in accordance with the act of March 2, 1872, giving its title. It was contended that this certificate concludes all questions as to the regularity and legality of the issue of the bonds; that the provision for registration of March 2, 1872, settles the question that the bonds were issued under that act, and were "regularly and legally" issued, according to the provisions of that act. The case of Lewis *v.* Commissioners[1] was cited as sustaining that view. The supreme court of the United States, in an able opinion by Justice Blatchford, distinguishes the two cases as follows: "In the case of Lewis *v.* Commissioners, section 14 of the Kansas act of March 2, 1872, was under consideration in regard to the bonds of a county in Kansas issued, in fact, under that act, each of which had indorsed on it a certificate by the state auditor, that it had been

[1] Lewis *v.* Commissioners, 105 U. S. 735.

'regularly and legally issued,' and that it had been registered in his office according to law. A defense was set up against a *bona fide* holder of the bond, that they had been issued in violation of the condition contained in the popular vote, and were fraudulently parted with by the person in whose hands they were put, to be deposited with the state treasurer in escrow, to await a compliance with the conditions. This court held, as to the effect of the registration, that the determination by the auditor involved an investigation as to every fact essential to the validity of the bonds; that the *bona fide* purchaser was not bound, under the circumstances as shown in that case, to find out whether the auditor had ascertained all the facts, and that the auditor was authorized by the statute to inquire whether the bonds were, as a matter of fact, of the class which, under the act, should have passed through the hands of the state treasurer (it being required by the act that some should do so and others not), and, also, whether the conditions on which they were delivered had been performed. But there is nothing in the decision which carries the doctrine further than that the auditor is authorized to ascertain whether the facts exist which the statute requires should exist to make a valid issue of bonds. But in this case the plaintiff, being referred by the recitals in the bonds to the act of March 1, 1872, as the statute under which the bonds were issued, was bound to take notice of that statute and all its requirements, and if, finding the bonds invalid under that statute, he claims the right to refer to the act of March 2, 1872, as the source of authority, he is bound to take notice of the requirements of that statute. As the recitals in the bonds are of no avail to the plaintiff, so the certificate of the auditor does not aid him. The bonds, on their face, excluded the possibility of their having been issued under the act of March 2, 1872, as the public record shows that the proceedings were not taken under that act, and as the auditor was authorized, by section 14 of that act, only to register a bond issued under that act, and as these bonds did not fall within the purview of bonds authorized to be registered by him under section 15 of that act, it follows that the auditor had no right to decide, as a matter of law, that the bonds were

bonds of the kind which he was authorized by the act of March 2, 1872, to register and certify, when, as a matter of law, they were not."[1]

§ 283. **Certificate of registration does not constitute an estoppel against the municipality issuing the bonds.**—The act of 1869 of the legislature of Illinois does not require that the state auditor shall determine or certify that the bonds have been regularly or legally issued; and the municipality issuing the bonds is not estopped by his registry or his certificate of registry.[2]

In this case, Mr. Justice Blatchford, who delivered the opinion of the court, addressing himself to this question, said: "The registration of the bonds by the state auditor has nothing to do with any of the terms or conditions on which the stock was voted and subscribed. Neither the registration nor the certificate of the registry covers or certifies any fact as to compliance with the conditions prescribed in the vote, on which alone the bonds were to be issued. The recital in the bonds does not contain any reference to the act of 1869, or certify any compliance with the provisions of that act; the certificate of registration merely certifies that the bond has been registered in the auditor's office pursuant to the provisions of the act of April 16, 1869. The statute does not require that the auditor shall determine or certify that the bonds have been regularly or legally issued. The case of Lewis *v.* Barbour County does not aid the savings bank. In that case, under an act of Kansas in regard to registry, the auditor had certified that the bonds had been 'regularly and legally' issued. In Dixon County *v.* Field, and in Crow *v.* Oxford, the first case arising in Nebraska and the second in Kansas, the certificate of the auditor in each case was that the bonds were 'regularly and legally' issued; but this court held, in both cases, that the municipality issuing the bonds was not estopped by the registry or the certificate,

[1] Crow *v.* Oxford Tp., 119 U. S. 215; Dixon Co. *v.* Field, 111 U. S. 83; Lewis *v.* Commissioners, 105 U. S. 739.

[2] German Savings Bank *v.* Franklin Co., 128 U. S. 526.

and that no conclusive effect was given by the registration statute to the registration or to the certificate.'"[1]

A recital under the laws of Colorado does not extend to or cover matters of law, and, therefore, a certificate reciting the actual facts, and that thereby the bonds are conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law.[2]

But it has been held that the official certificate of the auditor of Kansas that county bonds have been regularly and legally issued, that the signatures were genuine, and that the bonds had been duly registered in his office in accordance with the act of the legislature of March 2, 1872, estops the county.[3]

§ 284. **An act requiring registration after subscription is made to railroad does not impair the contract.**—An act requiring municipal bonds to be registered and ratified, passed after the contract of subscription was made to a railroad company and before the bonds were issued, does not change nor impair the contract and is not a retrospective law.[4]

§ 285. **Guaranty of municipal bonds.**—The question as to the power of municipal corporations to guaranty bonds of other corporations or individuals has already been considered, but it remains to consider the effect of a guaranty of municipal bonds by other corporations or individuals.[5]

In 1877 a case arose in the supreme court of the United States, from the district of Louisiana, involving this question in an action upon several coupons for interest annexed to bonds issued by the late city of Carrolton, in Louisiana, to the Jefferson City Gas Light Company, a corporation created under the laws of that state for laying gas pipes through certain streets of the city, and introducing gas for the use of its citi-

[1] German Savings Bank *v.* Franklin Co., 128 U. S. 526; Citizens' Sav., etc., Assn. *v.* Perry County, 156 U. S. 692, 15 Sup. Co. R. 547.

[2] Lake Co. *v.* Graham, 130 U. S. 674.

[3] Comanche Co. *v.* Lewis, 133 U. S. 198.

[4] Hoff *v.* Jasper Co., 110 U. S. 53.

[5] *Ante*, § 26.

zens. The bonds were indorsed by the president of the company with its guaranty for the payment of their principal and interest. His authority to make this guaranty, so far as it relates to the interest, was denied by the company; but the circuit court held that the admissions and evidence in the case showed a *prima facie* case of liability. The bonds were issued pursuant to an ordinance of the city, which provided for the payment of the interest thereon but made no provision for the payment of the principal, and for this omission, and because they were issued in aid of a private corporation, their validity was questioned by the city of New Orleans, upon which the liabilities of Carrolton were cast upon its annexation to that city. As it was contended in answer to this position that the legislature had subsequently, in the act of annexation, legalized the issue, the power of the legislature to do this was denied, but the circuit court held that the legislature possessed the power, and the city of New Orleans was adjudged bound to pay the bonds. The case was taken before the supreme court of the United States, and one of the questions presented to that court for adjudication was whether the Jefferson City Gas Light Company was liable on the guaranty made by its president for the interest on the bonds. The court held that the ordinance which authorized the contract with the company, and the issue of the bonds of the city, in terms provided that the company should "guaranty the said bonds and assume the payment of the principal thereof at maturity." Their delivery to the company was made dependent upon this condition; but as the provision mentioned that the company was to assume payment of the principal, after specifying that it was to guaranty the bonds, it was argued that the guaranty of the principal only was intended. This was not, however, a just inference from the language. The guaranty of the bonds embraced both the principal and the interest. The payment of bonds, without other designation, always implies the payment of the principal sum and its incidents, and a guaranty in similar terms covers both. The ordinance contemplated two undertakings by the company—one to the bondholder and one to the city. The guaranty was to be for the security of the bondholder; it was

to be an undertaking to answer for the city's liability, and to be collateral to it. The other undertaking was to be for the security of the city, by placing the company under obligation to provide for the payment of the principal of the bonds at their maturity, an obligation which otherwise would not have existed.[1]

§ 286. **Guaranty to pay interest on bonds.**—A guaranty to "pay interest upon the within bonds as specified in the interest coupons thereto attached" is not a declaration or promise to pay each coupon, but is a guaranty to pay the whole interest to become due on the bonds. And though each coupon is for less than one hundred dollars the guaranty is not prohibited by the statute requiring the obligation of a railroad company to be for not less than one hundred dollars each. And though the bonds and coupons are negotiable, the guaranty is not, it being neither a bill or note, which instruments are alone negotiable under a statute, and a guarantor may make any defense to an action on his contract by the transferee of the bonds or coupons that he could have made if sued by the original payee on the bonds.[2]

§ 287. **The general rule as to the sale of bonds.**—When bonds have been once put into the market as valid subsisting securities, they may be sold for any amount by the holder, like any other chattels. But in the hands of a municipality they are not, it is said, unless so made by the statute, the subject of sale, as distinguished from an exchange of securities or the borrowing of money, and that it is only by treating the transaction as the latter that it can be upheld.[3]

[1] New Orleans *v.* Clark, 95 U. S. 644. As to the effect of a guaranty of state aid bonds by a railroad company see McKittrick *v.* Arkansas Cent. R. Co., 152 U. S. 473, 14 Sup. Ct. R. 661.

[2] Eastern Tp. Bank *v.* Railroad Co., 40 Fed. R. 423; Thomas *v.* Railroad Co., 101 U. S. 71; Pennsylvania Railroad Co. *v.* St. Louis, etc., Railroad Co., etc., 118 U. S. 290; Oregon, etc., Navigation Co. *v.* Oregon, etc., Railroad Co., 130 U. S. 1; Vermont, etc., Railroad Co. *v.* Vermont Central, etc., Railroad Co., 34 Vt. 1, 50 Vt. 500; Langdon *v.* Vermont, etc., Railroad Co., 54 Vt. 593; Hazzard *v.* Railroad Co., 17 Fed. R. 753; Hough *v.* Gray, 19 Wend. 202; Watson *v.* McClaren, 19 Wend. 557; Trust Co. *v.* National Bank, 101 U. S. 68.

[3] Town of Danville *v.* Sutherlin, 20 Grat. (Va.) 555; City of Lynchburg

To borrow money and give a bond or obligation for it, and to sell a bond at less than par, are not, however, identical transactions, and mere authority to borrow money and issue bonds as evidence of the indebtedness is not, therefore, it seems, sufficient to empower the municipality to sell and deal in such bonds generally.[1]

§ 288. **The rule in Kansas and elsewhere.**—The supreme court of Kansas has held that legislative authority to issue bonds for the stock of a railroad company, or other work of public improvement, does not imply authority to sell them and apply the proceeds to pay for the stock, especially if the sale be below par.[2]

In Virginia it has been held that the authority to issue bonds for a loan of money does not imply authority to sell the bonds below par, and such a sale would be usurious if the discount were greater than allowed by law, and render the bonds absolutely void.[3]

The supreme court of the United States has held that the authority to dispose of bonds to the best advantage and invest the proceeds in stock will authorize the delivery of the bonds to the company for stock. So authority to dispose of bonds, "to the best advantage but not for less than par," and prohibiting the paying over of any money until certain assurances are given, will not prevent a municipal corporation from donating its bonds to a railroad company and collecting taxes for the payment of the bonds, if approved by a popular vote.[4]

§ 289. **Sale of bonds below par.**—In Pennsylvania it has been held that the prohibition of the sale of bonds below par

v. Norvell, 20 Grat. (Va.) 601. But see Griffith *v.* Burden, 35 Iowa 138.

[1] Gould *v.* Town of Sterling, 23 N. Y. 456, 460.

[2] City of Atchison *v.* Butcher, 3 Kan. 104; Daviess Co. Ct. *v.* Howard, 13 Bush (Ky.) 101.

[3] Town of Danville *v.* Sutherlin, 20 Grat. (Va.) 555; City of Lynchburg *v.* Norvell, 20 Grat. 601.

[4] Foote *v.* Town of Hancock, 15 Blatchf. (U. S.) 343; Town of Queensbury *v.* Culver, 19 Wall. 83; Woods *v.* Lawrence Co., 1 Black (U. S.) 386; Comrs. of Marion Co. *v.* Clark, 94 U. S. 278; Meyer *v.* City of Muscatine, 1 Wall. 284.

forbids the allowance of a rebate or commission to the purchaser.[1]

So, it has been held by the supreme court of Pennsylvania, that where the statute prohibited the sale of bonds for less than par, and the company sold them for less, the county might rescind the subscription, withdraw the bonds unsold, and recover the par value of those that had been sold.[2]

But a *bona fide* holder of railroad aid bonds, who acquires them in the usual course of business, may enforce them against the municipality, notwithstanding the company originally sold them for a sum less than that prescribed by the enabling act.[3]

In New York it has been held that an agreement to sell, at their face value, municipal bonds, with several months' accrued interest, is an agreement to sell them for less than par, and is therefore void.[4]

In a city in Texas, where a proposition submitted by the city council to the voters, as required by the city charter, asking authority to issue certain bonds, included the provision that such bonds are not to be sold for less than par, it was held that the city council could not, after approval by the voters of such proposition, sell the bonds below par.[5]

But where the proposition to issue city bonds which, submitted to a vote of the electors, did not limit the rate of interest the bonds were to bear, the bonds are not invalid because sold below par, if the discount added to the interest expressed does not make the rate usurious.[6]

The fact that the ordinance submitted to the voters fixed the rate of interest for the bonds, and their place of payment, and provided for their sale at par, does not, it has been held, form an unchangeable rule under which the council must negotiate the bonds; and the actual negotiation of the bonds at

[1] Whelen's Appeal, 108 Pa. St. 162.

[2] County of Lawrence *v.* N. W. Railroad Co., 32 Pa. St. 144; Lawrence Co's Appeal, 67 Pa. St. 87.

[3] Richardson *v.* Lawrence County, 154 U. S. 536, 14 Sup. Ct. R. 1157; Woods *v.* Lawrence County, 1 Black. 386, 410.

[4] Village of Fort Edward *v.* Fish, 33 N. Y. S. 784, 66 Hun 548.

[5] Nalle *v.* City of Austin, 21 S. W. R. 375.

[6] Nalle *v.* City of Austin, 22 N.W. R. 668.

a higher rate of interest than provided for in the ordinance will not be restrained at the suit of a tax-payer, where the mayor and council have acted in good faith, and have been unable to negotiate them at the rate originally fixed.[1]

Where the maximum rate on an issue of bonds was fixed by the council at five per cent., but the mayor was authorized to sell them, if he could, at a lower rate, his having succeeded in doing so can not be complained of by the tax-payers as an exercise of legislative power.[2]

§ 290. **Validity of sale of municipal bonds by resolution.**—Where, upon an election properly called and held, the mayor and council of a city of the second-class are given authority, by a majority of the votes cast at such election, to issue bonds to secure the erection and operation of water-works under the statute, such officials may sell and issue the bonds, if they deem it advisable, by a resolution of the city council properly passed therefor.[3]

§ 291. **When sale of bonds not usurious.**—The sale of a school bond for less than its face value, if it is not a device to evade the usury laws, is not necessarily usurious.[4]

§ 292. **Compensation for selling municipal bonds.**—Where funds derived from the sale of bonds of a city of the third-class are received, either by the city treasurer or other person acting in behalf of the city under the statutes of Kansas, the entire amount should, on demand, be paid into the city treasury. Such persons can not fix their own compensation for services in respect to such fund, or withhold a part of the proceeds as compensation for their services; but any such claim must be to the city council in writing, and allowed in a manner prescribed by statute.[5]

[1] Yesler *v.* City of Seattle (Wash.), 25 P. 1014, 1 Wash. St. 308.

[2] Frantz *v.* Jacobs, 88 Ky. 525, 11 S. W. R. 654.

[3] Smalley *v.* Yates, 41 Kan. 550; Smalley *v.* Yates, 36 Kan. 519; Meixell *v.* Kirkpatrick, 33 Kan. 282.

[4] Orchard *v.* School District, 14 Neb. 378; Armstrong *v.* Freeman, 9 Neb. 11.

[5] City of Syracuse *v.* Reed, 46 Kan. 520.

§ 293. **Sale of forged bond—Competent evidence.**—In an action to recover moneys paid for a school district bond alleged to be spurious and worthless, proof that there never was any such school district as appeared on the face of the bond to have issued it, is evidence that it is spurious and worthless; and evidence that the entire county is uninhabited and without any indication of ever having been inhabited is evidence tending to show that there never was any such school district.[1]

§ 294. **Sale of unauthorized bonds.**—The city board of education, authorized to issue bonds for certain purposes, and to sell them for not less than ninety-eight cents on the dollar, issued bonds purporting to be for such purposes, but in fact for an unauthorized purpose, accepted a bid from S therefor at par, delivered them to him, received part of the price, and transferred its right to the balance to the city, receiving a city warrant for the amount. S sold the bonds for ninety-seven and a half cents on the dollar. It was held that this constituted an executed sale of the bonds to S at par, and purchasers from him, who were strangers to this purchase from the board, were not chargeable with notice of the invalidity of the bonds, because they supposed they were buying from the board.[2]

§ 295. **Municipalities must account for benefits received from the sale of void bonds.**—Where a contract is entered into in good faith between a corporation, public or private, and an individual, and the contract is void in whole or in part, because of the want of power on the part of the corporation to make it or enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are

[1] Parmele *v.* Knox, 24 Kan. 113; Smith *v.* McNair, 19 Kan. 330.

[2] National Life Ins. Co. *v.* Board of Education, 62 Fed. R. 778. See, also, St. Paul Gas Light Co. *v.* Village of Sandstone, — Minn. —, 75 N. W. R. 1050; Fulton *v.* Town of Riverton, 42 Minn. 395, 44 N. W. R. 257.

such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity toward the other party, by either rescinding the contract and placing the other *in statu quo*, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return ; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit. It was therefore held, under the circumstances of this case, that although the contract and the additional bonds in this case are void, the city must account to the holders of the original bonded indebtedness for all benefits received by it for which it has rendered no equivalent, and this as nearly in accordance with the contract as the law and equity will permit.[1]

But this rule is not of universal application, and where there is an absolute want of power and a violation of the constitution in issuing bonds, it has been held that there can be no recovery, even in equity, of the amount of which the city has received the benefit.[2]

[1] Brown *v.* City of Atchison, 39 Kan. 37; Maduska *v.* Thomas, 6 Kan. 153; Bradley *v.* Ballard, 55 Ill. 413; Parish *v.* Wheeler, 22 N. Y. 494; Northwestern, etc., Packet Co. *v.* Shaw, 37 Wis. 655; Morville *v.* American Tract Society, 123 Mass. 129; Clark *v.* Saline Co., 9 Neb. 516; State Board of Agriculture *v.* Street Railway Co., 47 Ind. 407.

[2] Litchfield *v.* Ballou, 114 U. S. 190, 5 Sup. Ct. R. 820; Hedges *v.* Dixon County, 150 U. S. 182, 14 Sup. Ct. R. 71.

CHAPTER XIV.

FUNDING, RENEWAL AND COMPROMISE BONDS AND WARRANTS.

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§ 296. **The doctrine of the supreme court of the United States.** —When a municipality has the power to issue bonds it may

issue other bonds in renewal or redemption thereof. To do this, however, there must generally be a substantial consent of the holders of the original bonds. And when such new bonds are regularly issued, as under a vote of the people, the validity of the new bonds can not be questioned. The municipality, by issuing the new bonds, generally waives any defenses it may have to the old bonds. By the new issue it obtains an advantage in postponing the time of payment, and generally in the rate of interest, and after the holders of the original issue have surrendered their evidence the municipality will not be permitted to set up old irregularities as defenses which the creditor had the right to assume were waived when it made him the new issue of bonds.[1]

But the implied power of a municipality to merely borrow money or contract a loan does not confer upon the municipality the further power to issue funding negotiable bonds for the amount and sell them in open market as commercial paper.[2]

§ 297. **Doctrine of the state courts.**—Municipal bonds expressly issued to retire bonds issued to take up the floating debt of the municipality are not to be considered in determining whether the limit of indebtedness as fixed by the constitution of the state had been exceeded when the constitution provides that nothing shall prevent the issuing of renewal

[1] County of Jasper *v.* Ballou, 103 U. S. 745; County of Warren *v.* Marcy, 97 U. S. 96; County of Moultrie *v.* Rockingham, etc., Bank, 92 U. S. 631; Second Ward Sav. Bank *v.* City of Huron, 80 Fed. R. 660, affirmed in 86 Fed. R. 272; Comrs. of Douglass Co. *v.* Bolles, 94 U. S. 104; Marcy *v.* Oswego Tp., 92 U. S. 637; Town of Solon *v.* Williamsburg, etc., Bank, 114 N. Y. 122; Beach Pub. Corp., § 929.

[2] Merrill *v.* Monticello, 138 U. S. 673. And where the statute authorizes the retirement of old bonds by direct exchange, or payment from the sale of new bonds, it is held that only the amount of new bonds necessary to accomplish that purpose can be issued as refunding bonds. Comrs. *v.* Zimmerman (Ky.), 41 S. W. R. 428. As to refunding bonds issued to refund others, see Heins *v.* Lincoln, 102 Iowa 69, 71 N. W. R. 189.

bonds, or bonds to fund the floating indebtedness of the municipality.[1]

So, generally, it may be said that issuing refunding bonds in exchange for or in payment of outstanding valid bonds does not increase the indebtedness of the municipality within the meaning of the constitution.[2]

The laws of New York of 1889 and 1883 authorized any city to sell new bonds, and retire the old ones, as the latter may mature. The charter of the city of Poughkeepsie, under the laws of 1883, prohibited the council from borrowing any money for the city, except as therein provided, and provided that the "council shall not create any pecuniary obligations * * * * which shall not be payable in the current year." It was held that the council was not prohibited from selling new bonds to retire old ones, this not being the creation of any new obligation.[3]

A valid bond can not be paid by a void one. The debt is not extinguished by the void bond, and the debt created by the valid bond can be sued upon.[4]

Where bonds issued by municipal corporations are exchanged for others, under the provisions of a funding act, at a lower rate of interest, a subsequent act, applicable in terms to the original bonds, and making property before exempt liable for their payment, is inoperative, as those bonds had ceased to exist by their surrender and exchange for the funding bonds.[5]

Under the statutes of Pennsylvania of 1881, which authorized municipal corporations to issue new bonds to take up old ones, and provided that the holders of the old bonds shall have the right to surrender such bonds and receive new bonds, "in like amount, in lieu thereof," it was held that a

[1] Farson, Leach & Co. *v.* Board of Comrs. 97 Ky. 119, 30 S. W. R. 17.

[2] Powell *v.* City of Madison, 107 Ind. 106; City of Laporte *v.* Gamewell, etc., Co., 146 Ind. 466, 474; Ætna Life Ins. Co. *v.* Lyon County, 44 Fed. R. 329; Austin *v.* District Tp., 51 Iowa 102; Maish *v.* Arizona Territory, 164 U. S. 599, 17 Sup. Ct. R. 193; City of Huron *v.* Second Ward Sav. Bank, 86 Fed. R. 272.

[3] City of Poughkeepsie *v.* Quintard, 136 N. Y. 275, 32 N. E. R. 764, 19 N. Y. Supp. 944, 65 Hun 141.

[4] Jefferson County *v.* Hawkins, 23 Fla. 223, 2 So. R. 362.

[5] City of Henderson *v.* Seed (Ky.), 2 S. W. R. 770.

city could not compel the holder of old bonds to receive the new ones at a premium, though that was their market price.[1]

An act of the legislature of California of 1864, authorizing the liquidation of the indebtedness of the city of Sacramento which accrued prior to January 1, 1859, and empowering the board of trustees of the city to issue new bonds in liquidation to all holders of claims against the city, was passed merely for the purpose of completing the funding of the city's indebtedness, and did not withdraw claims existing before the passage of the act from the operation of the statute of limitations; and an action for mandamus to compel the board of trustees to issue bonds, as therein provided, in place of those issued by the city, under acts of April 10, 1854, could not be maintained where such bonds had, since the act of 1864, become barred by the statute of limitations.[2]

In Indiana a city has no authority to borrow money to defray the expense of litigation involving the removal of a county-seat and the cost of a lot, court-house and jail for the county, and a tax-payer of the city may enjoin the refunding of bonds issued to secure the money so borrowed.[3]

§ 298. **When funding bonds issued without an ordinance or resolution are void.**—Under the statute of Kansas which declares that the powers granted to cities of the second class "shall be exercised by the mayor and council of such cities," and article 7, section 11, which directs that funding bonds shall be duly issued only after an ordinance therefor shall be duly passed, funding bonds signed by the mayor of such city and attested by the city clerk, under the city seal, without any ordinance or resolution of the mayor and council, are void. And a recital in such bonds to the effect that all the requirements of the statutes have been strictly complied with in issuing them, does not estop the city from denying their validity.[4]

[1] Lloyd *v.* Altoona City, 134 Pa. St. 545.

[2] Bates *v.* Gregory, 89 Cal. 387, 26 Pac. R. 891, 22 Pac. R. 683.

[3] Myers *v.* City of Jeffersonville, 145 Ind. 431.

[4] Swan *v.* City of Arkansas City, 61 Fed. R. 478; National Bank of Commerce *v.* Town of Granada, 54 Fed. R. 100, 10 U. S. App. 692; Atchison Board *v.* De Kay, 148 U. S. 591; City of Alma *v.* Guaranty Savings Bank, 60 Fed. R. 203.

The power conferred by the statute of Kansas on cities of the first, second and third class to refund their indebtedness, is a power which can only be exercised by means of an ordinance duly enacted. Purchasers of refunding bonds issued by such cities under the statute must ascertain whether an ordinance authorizing the issuance of such bonds has been enacted, and can not rely upon a recital contained therein that they have been legally issued, when no ordinance was, in fact, adopted.[1]

§ 299. **Refunding bonds, how affected by a limitation in the charter of the city.**—The charter of a city conferred power to borrow money to an amount not exceeding two per cent. of the taxable property of said city, but contained this limitation of power: "Such loans may be made only for the purpose of procuring money to be used in the legitimate exercise of the corporate powers of such city, and for the payment of legitimate corporate debts." The United States circuit court for the district of Indiana, in construing this limitation, held that the power to issue bonds to replace in the treasury money already used in paying prior bonds is not conferred by a grant of authority to issue "refunding bonds" or "original bonds" to procure money for use in the "legitimate exercise of the corporate powers, and for the payment of legitimate corporate debts." And where a number of bonds, purporting to be "refunding bonds," are issued as one series, but part of them are not, in fact, refunding bonds, and are illegal, their illegality attaches to the whole issue so far that one who bids for them as refunding bonds can not be compelled to take even the amount that might have been legally issued.[2]

§ 300. **Refunding bonds issued under special laws.**—The constitution of a state recognized and made provision for the election and tenure of office of township officers, and by the

[1] Hinkley *v.* City of Arkansas City, 69 Fed R. 768, 16 C. C. A. 395; National Bank of Commerce *v.* Town of Granada, 54 Fed. R. 100, 10 U. S. App. 692.

[2] Coffin *v.* City of Indianapolis, 59 Fed. R. 221; City of Aurora *v.* West, 22 Ind. 88; State *v.* Hauser, 63 Ind. 155; Rushville Gas Co. *v.* City of Rushville, 121 Ind. 206, 23 N. E. R. 72; Brenham *v.* German, etc., Bank, 144 U. S. 173. But see Ætna Life Ins. Co. *v.* Lyon County, 44 Fed. R. 329.

statute of the state, which was a general act, the duties and powers of township officers were defined. Afterwards the legislature passed a general refunding law, which provided that, before any refunding bonds could be issued, an election should be held, at which the question should be voted upon, and that the proper authorities of any county, township or city should issue the refunding bonds provided for by such act and by the general laws of the state subsequently passed. Commissioners were also appointed to refund the bonded indebtedness of a certain township, and were empowered to do all things needful for the compromising and refunding of the township bonds. It was held that the act appointing commissioners to refund the bonded indebtedness of a certain township was a special act, and as its effect was to suspend the uniform operation of the general township law and of the general refunding act, it was in violation of the state constitution which ordains that "in all cases where a general law can be applicable, no special laws shall be enacted." And, therefore, the bonds issued were declared to be void.[1]

§ 301. **Power to refund municipal indebtedness.**—Where a city council is by its charter empowered to borrow money on the credit of the city, not exceeding a hundred thousand dollars, and issue its bonds therefor, and "with the money so borrowed, the city council shall first liquidate and discharge all legal indebtedness of the city," this will authorize the city to take up its floating indebtedness, and the bonds given for the money borrowed, if issued in conformity to the charter in other respects, will be valid and binding.[2]

§ 302. **Refunding money in the state treasury to the municipality on void bonds.**—Where taxes have been collected for the payment of registered bonds of a municipal corporation and interest thereon, a part of which bonds have been declared void, and the money arising from such taxes is in the

[1] Travelers' Ins. Co. *v.* Township of Oswego, 55 Fed. R. 361.

[2] City of East St. Louis *v.* Maxwell, 99 Ill. 439; Town of Ottawa *v.* County of La Salle, 12 Ill. 339; Huron *v.* Second Ward Sav. Bank, 86 Fed R. 272; Conklin *v.* El Paso, 44 S. W. R. 879, 988.

hands of the treasurer, but the amount in his hands collected for the payment of the void bonds, as distinct from the bonds which are valid, has not been definitely ascertained, it is not the duty of the auditor of public accounts to issue his warrant on the treasurer for the refunding of the money to the municipality, and he will have no authority of law so to do, and if he should issue his warrant for the unascertained amount, it could not be paid, and therefore mandamus will not lie to compel him to issue such warrant; but where a county has funds in the hands of the state treasurer, collected to pay interest coupons on its bonds registered according to law, a part of which bonds have been adjudged void, such funds may be legally, under the statute, applied to the payment of the valid bonds of such county.[1]

§ 303. **Contract and additional bonds, when void.**—Where a city of the second class refunds a portion of its outstanding bonded indebtedness at sixty cents on the dollar under a statute which permitted the city to refund such indebtedness at only that rate, and at the same time, and as a part of the same transaction, the city enters into a contract with the holders of the original bonded indebtedness to issue still other and additional bonds on the same bonded indebtedness, and to deposit such additional bonds with a third party, to be afterwards delivered to the holders of the original bonded indebtedness, and to become valid and binding instruments upon certain contingencies, and such additional bonds are so issued and deposited, both the *contract* and the *additional bonds* are void.[2]

§ 304. **Irregularities in funding municipal aid bonds—Estoppel.**—Where a township had duly issued bonds in aid of

[1] Swigert *v.* Hamilton Co., 130 Ill. 538.

[2] Brown *v.* City of Atchison, 39 Kan. 37, 17 Pac. R. 465; Hitchcock *v.* Galveston, 96 U. S. 341; Parkersburg *v.* Brown, 106 U. S. 487; Chapman *v.* County of Douglass, 107 U. S. 348; Railroad Co. *v.* Howard, 7 Wall. 392; Pine Grove Tp. *v.* Talcott, 19 Wall. 666; National Bank *v.* Mathews, 98 U. S. 621; Argenti *v.* City of San Francisco, 16 Cal. 255; Pimental *v.* City of San Francisco, 21 Cal. 351; Paul *v.* City of Kenosha, 22 Wis. 266; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Memphis, etc., Railroad Co. *v.* Dow, 19 Fed. R. 388; Hayes *v.* Galion, etc., Co., 29 Ohio St. 330. But see Heins *v.* Lincoln, 102 Iowa 69, 71 N. W. R. 189.

the construction of a railroad, and afterwards a compromise with the holders of such bonds was effected, and in exchange therefor funding bonds were issued, and the original bonds were taken up and canceled, and afterwards such township levied and collected taxes in payment of such funded indebtedness, and more than one-third of said funding bonds were thus paid, upon a showing that such bonds were in the hands of innocent and *bona fide* holders, it was held that thereafter such township was estopped from alleging any irregularities in the proceedings leading up to and in the issue of such funding bonds, and such estoppel was equally effective against individual tax-payers of the township.[1]

§ 305. **Validity of refunding bonds when warrants are included.**—The fact that bonds issued by a county in Kansas, under the refunding act of 1879, were issued by the county commissioners without a previous vote of the people, does not affect their validity, for by the general statutes of 1889 it was provided that the "powers of a county, as a body politic and corporate, shall be exercised by the board of county commissioners"; and, as there was nothing in the funding act prescribing by whom its powers shall be exercised, that duty falls upon the commissioners. And a statute authorizing the funding by a county of "matured and maturing indebtedness of every kind and description," includes indebtedness evidenced by county warrants.[2]

So, it has been held that it is no defense to an action on bonds issued to fund floating indebtedness that the proceeds were used to take up warrants issued for illegal purposes.[3]

[1] Brown *v.* Milliken, 42 Kan. 769; Board, etc., of Marion Co. *v.* Board, etc., 26 Kan. 181; Corporate Powers of City of Council Grove, 20 Kan. 619; Board, etc., of Morris Co. *v.* Hinchman, 31 Kan. 729; Brown *v.* City of Atchison, 39 Kan. 37; County of Tipton *v.* Locomotive Works, 103 U. S. 523; Marcy *v.* Township of Oswego, 92 U. S. 637; Ward *v.* Johnson, 95 Ill. 215; Thatcher *v.* The People, 98 Ill. 632; Meyor *v.* Brown, 65 Cal. 583; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Insurance Co. *v.* Bruce, 105 U. S. 328; Block *v.* Commissioners, 99 U. S. 686. See, also, Town of Solon *v.* Williamsburgh Bank, 114 N. Y. 122.

[2] Howard *v.* Kiowa Co., 73 Fed. R. 406.

[3] Second Ward Sav. Bank *v.* City of Huron, 80 Fed. R. 660, affirmed in 86 Fed. R. 272.

§ 306. **Effect of surrendering a valid obligation for one that is invalid.**—Where a valid evidence of indebtedness issued by a municipality is surrendered by the holder to the municipality, and a new evidence of debt is issued therefor, which is invalid, the legal rights of the creditor are not necessarily affected thereby.[1]

§ 307. **Contract with an attorney to sell refunding bonds.**—Where a person claimed to have discovered that certain bonds issued to a railroad company of a certain county, drawing ten per cent. interest, and supposed to have many years to run, were payable "on or before" the ultimate day of payment at the option of the county, and that they could be refunded with six per cent. bonds, and thereupon entered into a contract with the county commissioners of said county to procure the refunding of said bonds for a certain per cent. of the proceeds to be retained by him, it was held that the commissioners had no authority to enter into such contract, and that it was void. It was further held that where a county employs an agent to refund its bonds, and before the revocation of the authority he necessarily performs labor and expends money in the prosecution of the business from which the county derives the benefit he is entitled to a fair compensation for said labor and the repayment of said money.[2]

§ 308. **Refunding bonds—Mandamus—Estoppel.**—A county, in pursuance of a vote of the people in 1876, so directing, issued and delivered to a railroad company its negotiable ten per cent. coupon bonds, for the sum of $95,000, that being more than ten per cent. of the assessed valuation of the county. These bonds were duly registered and certified by the county clerk of the county issuing the bonds and by the secretary and auditor of state. Afterwards the county refused to pay the

[1] Merchants National Bank *v.* County of Pulaski, 2 Fed. R. 545. See, also, County of Jefferson *v.* Hawkins, 23 Fla. 223, 2 So. R. 362; Hills *v.* Peekskill, etc., Bank, 101 N. Y. 490; Ashley *v.* Board, 60 Fed. R. 55.

[2] State *v.* Lancaster Co., 20 Neb. 419; County of Platte *v.* Gerrard, 12 Neb. 244.

interest and an action was instituted against it in the circuit court of the United States for the purpose of collecting the interest due on the coupons. The defense of the illegality of the bonds, owing to the excessive issue, was interposed, but the bonds were held valid in the hands of a *bona fide* purchaser for value, and judgment was rendered against the county for $14,692.91. No proceedings in error or by appeal were taken for the purpose of obtaining a review of that judgment. The county board then agreed with the holders of the bonds to execute to them twenty-year six per cent. refunding bonds, to be substituted for the bonds of 1876, under the provisions of the act of February 28, 1883, of the laws of Nebraska. The refunding bonds were executed and registered and certified by the county clerk, but the secretary and auditor of state refused to register them or to certify that they were lawfully issued, alleging that such was not the fact. The county then applied to the court for a peremptory writ of mandamus to compel action by the state officers, and judgment was obtained in favor of the county awarding the debt and compelling the certification and registry. After they were certified and registered by the state auditor, the county exchanged them for the original bonds of 1876, and the interest accrued thereon, and destroyed the original bonds. In an action to enforce the payment of the interest accrued on the funding bonds, it was held by the supreme court of Nebraska that the county was estopped to deny their validity in the hands of a *bona fide* holder for value.[1]

§ 309. **Estoppel by recitals to deny validity of funding bonds.**—Where school bonds were void for having been issued

[1] State *v.* Wilkinson, 20 Neb. 610; Reineman *v.* C. C. & B. H. R. R. Co., 7 Neb. 310; State *v.* Alexander, 14 Neb. 280; Kneeland *v.* Gilman, 24 Wis. 39; Houfe *v.* Town of Fulton, 34 Wis. 608; Leavenworth *v.* Laing, 6 Kan. 274; Argenti *v.* City of San Francisco, 16 Cal. 255; Hooker *v.* Eagle Bank, etc., 30 N. Y. 83; Howe *v.* Keeler, 27 Conn. 538; Hart *v.* Stone, 30 Conn. 94, 1 Dillon on Munic. Corp., § 164; County of Jasper *v.* Ballou, 103 U. S. 745; Board of Liquidation *v.* Railroad, 109 U. S. 221; New Albany *v.* Burke, 11 Wall. 96; Dakota Co. *v.* Glidden, 113 U. S. 222. The general rule is that recitals may operate as an estoppel where they may be true and there is power to issue the bonds and authority to make the recitals. City of Huron *v.* Second Ward Sav. Bank, 86 Fed. R. 272.

in violation of the constitution of Iowa, which provides that no county or municipal corporation shall become indebted beyond five per cent. of the value of the taxable property therein, and even canceled by the owner, not a *bona fide* holder, in consideration of new bonds issued to him under the general laws of the state clothing school districts with power to issue refunding bonds, it was held that no estoppel arose, from recitals in the refunding bonds, to prevent a showing that the constitutional limitation was exceeded in the prior issue, and that a purchaser of such refunding bonds was bound to take notice of the value of the listed property of the district.[1]

§ 310. **The same—Notice to purchaser.**—It has been decided by the United States circuit court of appeals that where refunding bonds were issued, payable to bearer, and reciting that they were issued by the board of supervisors in conformity with the provisions of an act authorizing the county to issue such bonds and provide for the retirement of outstanding bonds, the purchaser was not bound, in the face of the recitals borne by the bonds, to investigate the nature of the refunding indebtedness.[2]

§ 311. **Validity of funding bonds, when the original bonds were irregularly issued.**—An act of the legislature of the state of Illinois authorized all municipal corporations to take up and cancel outstanding bonds and other evidences of indebtedness, issued for the benefit of a certain railroad under a prior act of the legislature, and fund the same. In an action involving the construction of the act of the legislature authorizing the funding of municipal indebtedness, it was held by the United States circuit court for the southern district of Illinois, that where a funding bond was regularly issued, and performance of all essential conditions alleged in the bond, payment could not be refused a *bona fide* holder upon the ground that the original

[1] Shaw *v.* The Independent School District, 62 Fed. R. 911. (Distinguished in City of Huron *v.* Second Ward Sav. Bank, 86 Fed. R. 272.)

[2] Ashley *v.* Board of Supervisors, 60 Fed. R. 55.

bond was issued by the county supervisors, instead of the county court, contrary to the terms of the original act.[1]

§ 312. **Reissue of bonds, when waiver of defects in old bonds.**—When a municipality, acting through the properly constituted authorities, has for its own benefit destroyed its old bonds and issued new ones in lieu thereof, it will not be allowed to urge the same defenses which might have been asserted against the surrendered obligations; these defenses and defects the holders of the new bonds have the right to assume were settled and waived by the canceling of the old bonds and the issuing of the new.[2]

§ 313. **New bonds in lieu of old—Failure of county to carry out agreement—The proper remedy.**—Bonds were issued by a county under an act of the legislature making it obligatory on the county to levy an annual tax sufficient to pay the interest on the bonds as it accrued, and the principal at maturity. Afterwards, the county proposed to the holders of such bonds that if they would scale them down twenty-five per cent. and take new bonds for the reduced sum, the county would annually levy and collect a sufficient tax to pay the interest on the new bonds as it accrued, and the principal at maturity, and that if it failed to do so, the holders of the new bonds should be restored to all their rights under the old bonds. Accordingly new bonds were issued under this agreement, but the county failed to pay the interest thereon, and by reason of the terms of the act under which they were issued, could not levy a tax for that purpose. It was held that an action at law

[1] Ballou *v.* County of Jasper, 3 Fed. R. 620. So, in other cases *bona fide* holders have been held entitled to recover on refunding bonds notwithstanding irregularities in the original bonds. City of Cadillac *v.* Woonsocket Inst., 58 Fed. R. 935; Ashley *v.* Board, 60 Fed. R. 55. And even though the original bonds were invalid. Brown *v.* Ingalls Tp., 81 Fed. R. 485.

[2] Chandler *v.* Town of Attica, 18 Fed. R. 299; Cowdrey *v.* Canadea, 16 Fed. R. 532; Rich *v.* Town of Mentz, 18 Fed. R. 52; Town of Aroma *v.* Auditor of State, 15 Fed. R. 843; County of Jasper *v.* Ballou, 103 U. S. 745; County of Moultrie *v.* Rockingham, etc., Bank, 92 U. S 631; Marcy *v.* Township of Oswego, 92 U. S. 637; Warren *v.* Marcy, 97 U. S. 96; Commissioners *v.* Booles, 94 U. S. 104. See, also, *ante*, § 296.

could be maintained on the original bonds, but that a bill in equity, not seeking for any discovery, would not lie.[1]

§ 314. **Power to compromise bonds.**—In the absence of any constitutional prohibition the corporate existence and powers of municipalities are subject to the legislative control of the states creating them. And where there is no constitutional prohibition the legislature of a state may properly authorize a municipality to create a debt for governmental purposes without the submission to a vote of the people, and may, in its discretion, select the agency by which the municipality is to act. But where a county had lawfully issued its bonds in aid of a railroad, and portions of its territory had been taken from other counties, an act which provided that the citizens and property within the old limits should remain liable to taxation for the payment of those old bonds, "as though this act had never been passed," was declared to be unconstitutional.[2]

§ 315. **Compromise of school district bonds and warrants.**—The act approved March 30, 1887, of the laws of Nebraska authorized counties, precincts, townships or towns, cities, villages and school districts to compromise their indebtedness and issue new bonds therefor. The supreme court of Nebraska, in construing this act in an original application for mandamus to compel the auditor of public accounts to register certain bonds issued by the school district to secure the payment of indebtedness evidenced by the warrants owned by the State Bank of Pender, held that it did not empower the school district to issue its bonds and deliver them to parties in compromise, or to take the place of an indebtedness evidenced by school district warrants or orders.[3]

Where township warrants are held by a person and he

[1] Merchants' National Bank *v.* County of Pulaski, 2 Fed. R. 545.

[2] Sinton *v.* Carter Co., 23 Fed. R. 535; Allison *v.* Railroad Co., 10 Bush 1; County Judge, etc., *v.* Railroad Co., 5 Bush 225; Bracken County Court *v.* Robertson County Court, 6 Bush 69; Railroad Co. *v.* County of Otoe, 16 Wall. 667; Town of Queensbury *v.* Culver, 19 Wall. 83; County of Callaway *v.* Foster, 93 U. S. 567; Mt. Pleasant *v.* Beckwith, 100 U. S. 514; Supervisors *v* Galbraith, 99 U. S. 214.

[3] State, etc., *v.* Moore, 45 Neb. 13; State *v.* School District, 13 Neb. 78; State *v.* School District, 13 Neb. 82.

makes an offer to compromise the same for funding bonds, and the bonds are issued under the general laws of Kansas, and the warrants are destroyed and the bonds are delivered to the persons holding the warrants, the transaction is completed so far as the authority to issue the bonds is concerned. Each condition precedent has been performed and has spent its force. If the township afterwards procures the bonds and destroys them, with the assent of the holder of the original warrants, before the rights of any other person attached thereto, the transaction is then entirely completed, and all persons are in the same condition as they were before the compromise was made.[1]

§ 316. **Compromise of bonds—When municipality not bound by contents of letter.**—Where the board of county commissioners of a county enters an order upon its records that certain railroad bonds issued by the county be compromised and settled at twenty-five cents for the face and accrued interest, and the chairman of the board and the county clerk of the county are authorized to receive the old bonds and issue new bonds in lieu thereof, in accordance with such order, but before issuing the new bonds the chairman and county clerk have notice, by letter from the holder of the bonds, that his settlement is upon the condition that, if like railroad bonds be compromised at a greater figure than twenty-five per cent., he is to receive the full benefit of the same, and the chairman and county clerk proceed to issue the new bonds according to the order of the board, which are accepted by the owner, it has been held that neither the board of county commissioners nor the county of which they are officers is bound by the contents of such letter.[2]

§ 317. **Effect of failure to publish ordinance.**—A statute provided that all town ordinances should be recorded in a book kept for that purpose and authenticated by the presiding officer of the board and the clerk, and all by-laws of a general

[1] Falkenstein Township *v.* Fitch, 2 Kan. Court of App. 193; Lewis *v.* Comrs. of Bourbon Co., 12 Kan. 186.

[2] Bd. of Comrs. of Leavenworth Co. *v.* Hamlin, 31 Kan. 105; Railroad Company *v.* Comrs. Paola, etc., 16 Kan. 302.

or permanent nature should be published in some newspaper, and such by-laws and ordinances should not take effect until the expiration of five days after they were so published, but the book of ordinances provided for in the act should be *prima facie* evidence of publication. In an action to recover on certain town bonds, it was held by the circuit court of appeals that an ordinance calling an election to authorize the funding of the floating debt of the town, which was passed but not recorded or published, never went into effect, and that bonds authorized by such an election were void.[1]

§ 318. **When a municipality will be estopped from denying the validity of a fraudulent issue of bonds.**—A statute provided that every county, city and township, or other municipality, may compromise and refund its indebtedness and issue new bonds, with interest coupons, in payment of the sum so compromised, the bonds to be signed and to contain certain recitals provided in the act, and to be issued by the proper officers to the holders of the indebtedness, and a record to be kept by the county clerk of the bonds issued in the several counties, showing the date, number and amount, to whom and in what amount issued. Certain bonds were issued by a township, which purported to have been issued under the act of 1879, and contained recitals that all the requirements had been complied with, and the records of the governing board of the township showed that all the proper steps had been regularly taken, and that the bonds were issued to refund certain scrip held by one G, and were delivered to him. In fact, the bonds were issued to the owners of a sugar factory, to induce them to locate it in the township, and the scrip held by G was issued to him without consideration, to create an apparent debt to be refunded. A proposal by the owners of a factory to locate it in the township, in consideration of the bonds, and an agreement reciting the delivery of the bonds, were copied into the record books of the governing board of the township, but formed no

[1] National Bank of Commerce *v.* Town of Granada, 54 Fed. R. 100; National Bank of Commerce *v.* of Granada, 48 Fed. R. 278, 41 Fed. R. 87, 44 Fed. R. 262.

part of the records of the meetings at which the bonds were authorized, and were not mentioned or referred to in those records. It was held by the United States circuit court of appeals that, as against a *bona fide* purchaser of the bonds, without notice of the falsity of the record and the recitals in the bonds, and of the illegal purpose for which they were, in fact, issued, the township was estopped to deny that the bonds were issued to refund its indebtedness.[1]

§ 319. **Failure to make assessment in time.**—The United States circuit court of appeals has also decided that a municipal corporation can not dispute the validity of an assessment made by the officers on the ground that it was not completed and filed within the statutory time, so as to invalidate such an indebtedness based upon such assessment.[2]

§ 320. **Scaling down bonded indebtedness, how determined.**—The right to determine whether a municipality shall scale down its bonded indebtedness, and issue new bonds for the remainder, lies with the legislature, under the constitution of the state, and not with the people of the municipality.[3]

[1] West Plains Tp. *v.* Sage, 69 Fed. R. 943.

[2] Town of Darlington *v.* Atlantic Trust Co., 68 Fed. R. 849, 16 C. C. A. 28.

[3] Travelers Ins. Co. *v.* Township of Oswego, 59 Fed. R. 58.

CHAPTER XV.

RATIFICATION OF MUNICIPAL SECURITIES.

Power of the Legislature to Validate Invalid Municipal Bonds and Warrants.

§ 321. General power of the legislature to validate invalid bonds.
322. Power of the legislature to cure void proceedings.
323. Illustration.
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Power of Municipality to Ratify Bonds and Warrants.

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338. When levy of taxes and payment of interest does not constitute a ratification.
339. Limitations upon the power of ratification.

§ 321. **General power of the legislature to validate invalid bonds.**—In the absence of special constitutional restriction, the competency of the legislature to enact retrospective statutes, to validate an irregular or defective execution of a power by a municipal or public corporation, is undoubted.[1]

The legislature has power to pass a curative act validating bonds issued by a municipality, where the defects consisted of the fact that the submission of the question as to whether or

[1] County of Jasper *v.* Ballou, 103 U. S. 745; Gelpcke *v.* City of Dubuque, 1 Wall. 220; Bissell *v.* City of Jeffersonville, 24 How. 287; Booles *v.* Town of Broomfield, 120 U. S. 759; Read *v.* Plattsmouth, 107 U. S. 568; Otoe Co. *v.* Baldwin, 111 U. S. 1; Thompson *v.* Perrine, 103 U. S. 806; *Ante*, § 24.

not they should be issued was under the wrong act, and where the vote was taken upon the wrong day, and there were informalities in respect to keeping the record and filing the certificates of election.[1]

Where a state legislature possesses the power to authorize the issue of bonds, it can, by retrospective act, remedy all irregularity in their issue.[2]

Municipal bonds issued without authority of law, and therefore invalid, may be validated by an act of the legislature passed for that purpose, if the legislature of the state could authorize the issue of similar bonds.[3]

§ 322. **Power of the legislature to cure void proceedings.**—The supreme court of the United States, in considering this subject, speaking by Mr. Justice Clifford, said: "Mistakes and irregularities in the proceedings of municipal corporations are of frequent occurrence, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are generally regarded as unobjectionable, and certainly are within the competency of the legislative authority."[4]

§ 323. **Illustration.**—The power of the legislature to pass curative acts confirming and declaring valid the securities of municipal corporations which were, when issued, not binding upon them, because of defect of authority or regularity in the proceedings of their issue, is well illustrated in a case which arose in the supreme court of the United States in 1877 from the state of Louisiana. The city of Carrollton entered into a contract with a gas company for furnishing gas to the city, and issued its bonds in payment, but it failed, in the ordinance di-

[1] Campbell *v.* City of Kenosha, 5 Wall. 194; St. Joe Tp. *v.* Rogers, 16 Wall. 644; Gardner *v.* Haney, 86 Ind. 17. So, as to a defect in the notice of election. Cumberland County Supervisors *v.* Randolph, 89 Va. 614.

[2] Thompson *v.* Lee Co., 3 Wall. 327.

[3] Deyo *v.* Otoe Co., 37 Fed. R. 246; State *v.* Babcock, 23 Neb. 802, 37 N. W. R. 645; Otoe Co. *v.* Baldwin, 111 U. S. 1.

[4] Bissell *v.* Jeffersonville, 24 How. 287.

recting the issue, to provide for the means of paying the principal and interest as required by the statute of 1855. The city was, in 1874, annexed to the city of New Orleans. The act of annexation provided that the debts and liabilities of the city of Carrolton, including the funding and improvement bonds, and the bonds issued by the Jefferson City Gas Light Company, and known as gas bonds, "should be assumed and paid" by the city of New Orleans. The act of the legislature of Louisiana, passed in March, 1855, had declared that the constituted authorities of incorporated towns and cities in the state should not thereafter have power to contract any debt or pecuniary liability, "without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt or contract." The bonds were issued under this act. This enactment imposed a restriction upon the creation of liabilities of municipal bodies which could not be disregarded. It was intended to keep their expenditures within their means; and its efficacy in that respect would be entirely dissipated if debts contracted in violation of it were held legally binding upon municipalities. The supreme court of the United States held that the omission to comply with the act of 1855 was a defect of such a character that the bonds could not have been enforced at law, but it was competent for the legislature to impose upon the city the payment of claims just in themselves, and for which an equivalent has been received, but which from some irregularity or omission in the proceedings by which they were created can not be enforced in an action at law.[1]

§ 324. **Power to validate ultra vires acts.**—The power to issue bonds, as heretofore stated, is derived from the legislature, and the various proceedings to be taken by the officers of municipalities before issuing bonds are prescribed by that body. And as the legislature has the power to prescribe the conditions and limitations upon which the power may be exercised, and might have originally omitted any one of the conditions precedent, so, when the power has been exercised and the bonds issued, the legislature may, by a retrospective act,

[1] Jefferson City Gas Light Co. *v.* Clark, 95 U. S. 644.

dispense with any condition which has been omitted, or has been performed in an irregular manner, and declare the bonds valid, notwithstanding such defect or irregularity when issued.

It is not, however, every defect or irregularity which can be cured by legislative enactment. For example, when the constitution of the state requires the vote of the electors upon the question whether bonds shall be issued, failure to take such a vote is a defect which can not be cured by the legislature. It is a constitutional requirement which they could not have dispensed with in the original act, and they can not, by retrospective act, exercise greater power than they could prospectively.[1]

§ 325. **Illustration.**—A case arose in the supreme court of the United States in 1887, from the state of Tennessee, which also illustrates this question. The municipal authorities of a city brought suit to enjoin, perpetually, the collection of certain municipal bonds on the ground that they were issued without authority of law. By consent of the parties it was ordered that the temporary injunction be dissolved. The plaintiffs in the suit had demurred to the defendant's rejoinder to their replication, and this demurrer was overruled. The consent to the entry of judgment was made in pursuance of a compromise by which it was agreed that the municipality for a certain consideration should let a decree be entered in favor of the validity of the bonds. The decree accordingly declared the bonds to be valid and binding on the municipality. The supreme court held that the act of the mayor in signing that agreement could give no validity to the bonds if they had none at the time the agreement was made. The want of authority to issue them extended to a want of authority to declare valid. The mayor had no such authority. The decree of the court was based solely on the declaration of the mayor in the agreement that the bonds were valid; and that declaration was of no more effect than the declaration of the mayor

[1] Sykes *v.* Columbus, 55 Miss. 115; Marshall *v.* Silliman, 61 Ill. 218; Choisser *v.* People, 140 Ill. 21; Quaker City Nat. Bank *v.* Nolan County, 59 Fed. R. 660; Katzenberger *v.* Aberdeen, 121 U. S. 172, 7 Sup. Ct. R. 947.

in the bill of chancery that the bonds were invalid. The adjudication in the decree can not, under the circumstances, be set up as a judicial determination of the bonds.[1]

This was not a case of a submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision, by a person who had no right to bind the town by such a consent, because it gave life to invalid bonds; and the authorities of the municipality had no more power to do so than they had to issue the bonds originally.[2]

§ 326. **The doctrine in Kansas.**—The supreme court of Kansas has held that an act of the legislature which declared valid and binding bonds which had been issued by county officers on account of the county court-house, and which bonds were not enforcible against the county because differing in form and substance from the warrants authorized by pre-existing statute, was in excess of legislative authority and therefore void.[3]

In this case the opinion of the court was delivered by Justice Kingman, who said: "The act differs from those retrospective laws, which are frequently passed, supplying defects and curing informalities in the proceedings of officers and tribunals acting within their scope and authority. The county commissioners were not acting within the scope of their authority in issuing these bonds. They did not conform to the law only in an irregular way, but they broke down the barriers which the law had raised in a very regular way, and their acts in the premises were void not for want of any formality or regularity or mistake as to time or otherwise, but for want of power under the law. The defendant had his rights. The law pointed them out. He was entitled (if to anything) to his warrant, and must bide his time for their payment under the limited power of taxation conferred on the board. He preferred bonds with a high rate of interest, trusting to the heal-

[1] Russell *v.* Place, 94 U. S. 606; Manhattan Life Ins. Co. *v.* Broughton, 109 U. S. 121; Martin *v.* Ty., 5 Okla. 188.

[2] Kelley *v.* Milan, 127 U. S. 139.

[3] Com'rs of Shawnee Co. *v.* Carter, 2 Kan. 115.

ing power of subsequent legislation. He had as much right and power to bind the county in the execution of these bonds as the board had. If he had made these bonds the legislature would have had as much power to make them valid by an act declaring them binding upon the county as it had in the present case. Let such a power be once recognized, and within what bounds will the exercise of it be limited? The legislature undertook to make a law for this case, affecting and changing rights and imposing burdens contrary to previously established law, so that the act, if valid, has all the force of a judgment, though in violation of the principles upon which judgments are rendered. If the act is a law, there is no evading it, even could it be proven that none of the work had been done, or that it had been previously paid for, or that the contract had been procured by fraudulent collusion between the officers making it and the contractor. Courts are estopped from an inquiry into the fact by the act itself, if it had any force in the case. We cite these results from the act, not as having any existence in the case, but to show the consequence which would result from upholding the power of the legislature to exercise such authority."

§ 327. **The doctrine in Illinois.**—Where an election on the question of municipal subscription to the stock of a private corporation was void, because called and ordered by persons not authorized to call the same, and consequently not a valid authority for the creation of corporate indebtedness or liability, the legislature was powerless, under the constitution, to validate such election by subsequent enactment and require the issuing of bonds peremptorily. The effect of such legislation was to create a municipal indebtedness without the assent of the municipality.[1]

A township was authorized to subscribe for stock in a railroad and issue its bonds to the extent of thirty-five thousand dollars upon a vote of the electors. And on the 11th of February, 1869, notice was given of an election to be held under the charter on the 16th of March, 1869. Five days later

[1] Gaddis *v.* Richland Co., 92 Ill. 119. See, also, *post*, § 331.

notice was given of another election, not purporting to be in pursuance of the charter, for an additional subscription of forty thousand dollars, to be held at the same time and place. Each of the elections resulted in favor of the amounts subscribed. Seven days before the elections were held, to wit, on the 9th of March, 1869, the charter was amended so as to authorize towns in which said road might thereafter be located to vote and subscribe a hundred thousand dollars to its capital stock. No new notice was given of an election under this amended charter, and, indeed, could not have been, for the charter required a notice of twenty days, and there were only seven to elapse before the election. The election as to thirty-five thousand dollars was valid, but as to the forty thousand dollars there was really no election; the election held was without authority, and the one authorized by the amended charter was never held. On the 7th of April, 1869, the legislature passed an act declaring the election held on the 16th of March, 1869, as to the forty thousand dollars, to be legal, and as valid and binding on the township as if it had been made under the charter. Shortly after this act the supervisor and township clerk, who, under the charter, were authorized to issue the bonds and coupons, issued the forty thousand dollars of bonds. The supreme court of Illinois held that the town supervisor and town clerk who issued the bonds did not represent the corporate authorities of the town, in the sense of the constitutional provision, and that authority could not be conferred upon them by the legislature to bind the town, and, therefore, the act of the legislature validating the bonds was in excess of the legislative authority and could not cure the defect or irregularity in the issue.[1]

The supreme court of the United States, in passing upon the validity of these bonds, sustained the rulings of the Illinois supreme court.[2]

§328. **The rule in Wisconsin.**—Where a city in Wisconsin was authorized by an act of the legislature to improve its har-

[1] Marshall *v.* Silliman, 61 Ill. 218; Wylie *v.* Silliman, 62 Ill. 170.

[2] Township of Elmwood *v.* Marcy, 92 U. S. 289.

bor at an expense not to exceed a hundred thousand dollars, under this act a contract was made by the common council of the city of Milwaukee in excess of the sum fixed by the legislature. However, the legislature, by a subsequent act, ratified and confirmed the contract. The supreme court of that state held that the legislature had no right to declare valid a contract made in excess of authority without assent of the city.[1]

But where city bonds were issued without legislative authority, merely because the act authorizing their issue had not been published at the time so as to take effect, but there had been a popular vote in favor of the issue of the bonds, the legislature might, with the consent of the city authorities, authorize and ratify the issue, and thus give validity to the bonds.[2]

§ 329. **The rule in New York.**—In New York the taxpayers of the town were required to give their written assent and certain affidavits were required to be filed with the assent in the office of the county clerk before the bonds could be issued. These conditions had been complied with in an irregular and informal manner. After the bonds had been issued in such a manner the legislature, by an act provided: "And when bonds have been issued by the commissioner, or commissioners, of any town, and the said railroad shall have been constructed through such town, the bonds shall be binding and valid on said town, without reference to the former sufficiency of such affidavits, and the principal and interest on the bonds shall be levied, raised and paid in the manner provided in the original act." It appearing that the railroad had been constructed through the town the defective execution of the power was considered as cured by said act of the legislature. The court, in delivering the opinion, used the following language: "The officers authorized under these statutes to issue the bonds are public agents, and the legislature, looking over the whole matter, may, when in its judgment justice requires it, ratify and confirm their acts which would otherwise be invalid. In this case, the legislature could originally have authorized the bonds

[1] Hasbrouck *v.* City of Milwaukee, 13 Wis. 37.

[2] Knapp *v.* Grant, 27 Wis. 147.

of the town to be issued under the precise circumstances under which they were issued, and if the acts of the commissioners have, by subsequent legislation, been ratified, it is equivalent to an original authority to do what has been done.'"[1]

§ 330. **Power of the legislature to ratify bonds issued under void ordinances.**—Where certain ordinances of a city providing for the issuance of bonds were invalid, but the state legislature thereafter passed an act legalizing, ratifying and declaring them valid, and providing that all bonds issued and to be issued in accordance with their provisions should be legal obligations of a city, in an action to recover upon certain bonds and coupons issued by a city it was held that the effect of the act was to make the ordinances part and parcel of the statute, so that the method of issuing the bonds prescribed in the ordinances, namely, by resolution of the board of trustees directing when and to whom the bonds should be issued and delivered, must be strictly followed, and a disregard thereof would render the bonds void.[2]

§ 331. **Legislative power to validate void contracts.**—According to the Illinois decisions an act of the legislature professing and attempting to validate a contract of a county to make a donation to a railway company, such contract being utterly void for want of power to enter into the same, and thus impose upon the county an indebtedness to which it has never assented, is null and void.[3] But, unless the constitution prohibits it, the mere fact that an indebtedness is imposed without the assent of the municipality will not always prevent the legislature from validating an act which was done without the assent of the tax-payers.[4]

[1] Town of Duanesburg *v.* Jenkins, 57 N. Y. 177; Williams *v.* Town of Duanesburg, 66 N. Y. 129.

[2] Lehman *v.* City of San Diego, 73 Fed. R. 105. Affirmed in 83 Fed. R. 669.

[3] Choisser *v.* The People, 140 Ill. 21; Wiley *v.* Silliman, 62 Ill. 170; Barnes *v.* Town of Lacon, 84 Ill. 461; Cairo, etc., Railroad Co. *v.* City of Sparta, 77 Ill. 505. See, also, Horton *v.* Town of Thompson, 71 N. Y. 513. But compare Williams *v.* Town of Roberts, 88 Ill. 11.

[4] Thompson *v.* Perrine, 103 U. S. 806, 106 U. S. 589. See, also, Quincy *v.* Cooke, 107 U. S. 549.

§ 332. **When legislature may legalize void subscriptions in aid of railroads.**—The legislature may legalize a subscription to the stock of a railroad, made by a municipal corporation, without authority, unless prohibited by the constitution, and if the subscription would have been legal had it been done under legislative authority.[1]

The power to cure defective subscriptions to the stock of railway companies, and to validate bonds issued therefor, has been frequently exercised and judicially sustained. Subsequent legislative sanction, within constitutional limits, is equivalent to original authority. But the intention of the legislature to validate the subscription or the bonds must clearly appear from the terms of the curative act. An oblique validation, or one expressed in doubtful, covert or obscure language, will not be sufficient, especially where the subscription was made or the bonds issued in disregard of conditions which the constitution required the legislature of the state to impose upon the municipality before the power to make the subscription or issue the bonds should arise or exist.[2]

It appeared that the constitution of Mississippi of 1869 prohibited the legislature from authorizing any municipal subscription to any corporation "unless two-thirds of the qualified voters at a special or regular election shall assent thereto." In 1871, without any statute authorizing it, an election was held in the city of Holly Springs, Mississippi, which resulted in favor of a subscription by the city of $75,000 to a specified railroad company. In 1872 the legislature passed an act providing that "all subscriptions to capital stock of said railroad company made by any county, city or town in the state, not in violation of the constitution, are hereby legalized, ratified and confirmed." After this act, bonds of the city were issued, which recited that they were "issued under and in pursuance of the constitution and laws of Mississippi, and author-

[1] Grenada County, etc., *v.* Brogden, 112 U. S. 261; distinguished in Hayes *v.* Holly Springs, 114 U. S. 120.

[2] Hayes *v.* Holly Springs, 114 U. S. 120; Beloit *v.* Morgan, 7 Wall. 619; Brown *v.* Mayor, etc., of New York, 63 N. Y. 239; Board of Finance, etc., *v.* Jersey City, 57 N. J. L. 452, 31 Atl. R. 625.

ized by a vote of the people of the city at a special election held for the purpose." But, as the provisions of the constitution are inhibitory upon the legislature, and not enabling to the city; as under the constitution legislative authority to enable the municipality to issue such bonds must provide for the assent of two-thirds of the voters at an election; as no such election has been provided for by legislative act; as the curative act of 1872 made no reference to the unauthorized election of 1871, and did not ratify and approve it; and as the language of the curative act was too vague to warrant the conclusion with certainty that the legislature "intended to confirm and ratify the subscription in question," it was held to be insufficient for that purpose, and the plaintiff, although a *bona fide* holder of the bonds containing the recitals of full compliance with the constitution and laws of the state, was defeated.[1]

Power of Municipality to Ratify Bonds and Warrants.

§ 333. **General principles stated.**—Questions of ratification most frequently arise in respect to the acts or omissions of agents, but the general rule is the same in all cases where the act done was one which was competent for the parties attempted to be charged to do. When the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings or omissions of his agents, he will be bound thereby as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent which such acts, doings or omissions reach.[2]

Ratification is inoperative if the party attempted to be charged was not competent to make the contract in question when the same was made, and when the supposed acts of rati-

[1] Hayes *v.* Holly Springs, 114 U. S. 120. But compare Erskine *v.* Nelson County, 4 N. Dak. 66, 27 L. R. A. 696. So, it will not be presumed that the legislature intended to ratify a fraud, and where it was unknown to the legislature the alleged ratification may be ineffective on that account. Santa Ana Water Co. *v.* Town of San Buenaventura, 65 Fed. R. 323.

[2] Story on Agency, § 239; Fleckner *v.* United States Bank, 8 Wheat. (U. S.) 339; N. Y & N. H. R. R. Co. *v.* Schuyler, 34 N Y. 30.

fication were performed, or if the contract was illegal, immoral or against public policy.[1] Like an individual, however, a corporation may ratify the acts of its agents done in excess of authority, when it could have authorized them in the first instance and at the time of the ratification, and such ratification may, in many cases, be inferred from acquiescence in those acts, as well as from express adoption.[2]

Such ratification may be by express consent or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name, and it was held in New York that this principle is as applicable to corporations as to individuals.[3]

Where the officers of the corporation have exercised powers affecting the interests of third persons, which presuppose a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.[4]

Thus, where a county in Illinois had issued bonds in aid of a railroad company, but their validity was drawn in question because the election, at which the popular vote was in their favor, had been ordered by the wrong authority, but notwithstanding such irregular issue of the bonds, taxes had been levied and interest paid on them for a period of nine years, the supreme court of the United States, in an able opinion by Justice Clifford, declared that preliminary proceedings looking to such a subscription by a municipal corporation may often be enjoined for defects or irregularities before the contract is perfected, in cases where the corporation will be held to be for-

[1] See as to *ultra vires* contract, *ante*, § 24, and *post*, § 337.

[2] Hopt *v.* Thompson, 19 N. Y. 207; Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Mechem on Agency, §§ 111, 112, 118.

[3] Peterson *v.* Mayor of New York, 17 N. Y. 449; Mechem on Agency, § 118. But in the case of a municipal corporation it can not so readily be inferred from the acquiescence alone, especially the acquiescence of unofficial individuals. Mechem on Agency, § 159.

[4] Bank of United States *v.* Danbridge, 12 Wheat. 70; Marshall Co. *v.* Schenck, 5 Wall. 772.

ever concluded, if it remains silent and suffers the shares to be purchased, the bonds to be issued, and the securities to be exchanged. "Nothing of this kind was attempted in this case, and the defendants have never rescinded or attempted to rescind the contract; and have never returned or offered to return the evidence of their ownership of the shares in the stock of the company, but have annually acknowledged the validity of the bonds by voting taxes for the payment of the accruing interest, and have actually paid the same to the amount of six thousand dollars. * * * All the acts of the board of supervisors of the county in making the subscription, purchasing the shares, issuing the bonds, and exchanging the securities, appear to have been open and well known to the corporation, and yet they constantly suffered themselves to be represented in the choice of officers and in the management of all the affairs of the railroad company, and have voluntarily voted taxes for the payment of the yearly interest on the bonds, and actually paid the same, as admitted in the special plea. Examined in the light of those suggestions, it would be difficult to imagine a case where the rule that a subsequent ratification is as good and the previous authority can be more justly applicable than in the case under consideration."[1]

§ 334. **Ratification of municipal bonds by payment of interest.**—Payment of interest on bonds is some evidence of ratification, and when continued for a long period of time may estop the municipality from taking advantage of irregularities. Thus, it has been held that whether the commissioners or the defendant complied with the statutory requirement in issuing its bonds or not, the defendant ratified their act by paying interest for six or seven years upon the bonds, and retaining the stock of the railroad company received in exchange for the bonds.[2]

[1] Marshall Co. *v.* Schenck, 5 Wall. 772; Mills *v.* Gleason, 11 Wis. 470; Bissell *v.* Michigan, etc., Railroad Co., 22 N. Y. 258; Angel and Ames Corporation, §§ 237, 304; 2 Kent Com. 848.

[2] First National Bank of Oswego *v.* Town of Walcott, 7 Fed. R. 892; Irwin *v.* Town of Ontario, 3 Fed. R. 49; Pompton *v.* Cooper Union, 101 U. S. 196.

All questions of doubt in relation to the validity of municipal bonds should be answered in favor of their legality, where the city has repeatedly recognized the validity of such bonds, and has paid interest on them for a series of years.[1]

So, where shares in a railroad company, received by the officers of a county, and exchanged for their bonds, were never returned, and the proper officer of the county voted for directors at two elections, and the supervisors paid two annual installments of interest, the supreme court of Illinois held that those acts, unexplained, were satisfactory evidence of a design to ratify the issue of the bonds as if it had been done by an order of the supervisors.[2]

§ 335. **The rule in Kansas and elsewhere.**—The supreme court of Kansas has held that where the failure of a railroad company to complete a specified number of miles of its work within a specified time was set up as a defense to defeat bonds issued in aid of it by the county commissioners, who had waived the matter of time, the bonds were valid, the public having had notice and acquiescing, and the interest having been paid for a period of two years.[3]

In Ohio, where the tax-payers of a township made no objection to the validity of a subscription to a railroad company until three or four years had elapsed thereafter, and during that period submitted to taxation and the payment of interest on the bonds issued under it, it was held that they could not then object to the validity of the bonds which had passed into the hands of *bona fide* holders.[4]

§ 336. **Ratification of municipal aid bonds.**—The laws of 1872, of the state of Mississippi, gave a city the power to sub-

[1] Portsmouth Savings Bank *v.* City of Springfield, 4 Fed. R. 276.

[2] Johnston *v.* County of Stark, 24 Ill. 75; Pres., etc., of Keithburg *v.* Frick, 31 Ill. 421. See, also, County of Cass *v.* Gillett, 100 U. S. 585; Pendleton Co. *v.* Amy, 13 Wall. 297; 2 Elliott R. R., § 894; *post*, § 437. But see Stebbins *v.* Perry County, 167 Ill. 567, 47 N. E. R. 1048.

[3] Leavenworth R. R. Co. *v.* Douglass Co., 18 Kan. 170. See Treadway *v.* Schnauber, 1 Dak. 236; Town Council of Lexington *v.* Union Nat. Bank (Miss.), 22 So. R. 291.

[4] State *v.* Van Horne, 7 Ohio St. 327. See, also, Kellogg *v.* Ely, 15 Ohio St. 64; Jones *v.* Cullen, 142 Ind. 335, 40 N. E. R. 124.

scribe in aid of a certain railway, and to issue its bonds therefor. No provision was made for an exchange of bonds for stock and stock was not mentioned in the act. An act was passed by the legislature in 1882 ratifying the consolidation of said railroad company and others into the Georgia Pacific Railroad Company. The act provided that a donation of a hundred thousand dollars of its bonds by the town of Columbus, in aid of the railroad company, but which had not yet been paid over "be and are hereby declared to be payable to the Georgia Pacific Railway Company." In 1884 the city charter of Columbus was amended so as to authorize it to levy and collect a special tax to pay the interest on such bonds, and provide a sinking fund to pay the principal. The bonds were voted as a donation by the constitutional majority of two-thirds of the qualified voters, and interest was paid on the bonds for eleven years. It was held by the United States circuit court for the northern district of Mississippi that even if the donation made was not originally authorized, but only a subscription to the capital stock of a railway company, such donation had been ratified by the legislature, the municipal authorities and by the people.[1]

§ 337. **The doctrine of ratification in the federal courts.**— Municipal authorities can not ratify bonds issued without lawful power. The ratification can only be made when the party ratifying possesses power to perform the act ratified.[2]

Where corporate authorities, having power to do so, ratified the bonds by a series of unmistakable acts and issued new ones in place of the old, they can not repudiate them.[3]

In order to show that a subscription to railroad stock and the issue of bonds by a city was ratified by a majority of its tax-payers, the poll books of an election held for that purpose,

[1] Denison *v.* Mayor, etc., of City of Columbus, 62 Fed. R. 775. Affirmed on appeal in Mayor, etc., of City of Columbus *v.* Denison, 69 Fed. R. 58. See, also, Town Council of Lexington *v.* Union Nat. Bank, — Miss. —, 22 So. R. 291.

[2] Marsh *v.* Fulton Co., 10 Wall. 676; Norton *v.* Shelby Co., 118 U. S. 425; Union Bank *v.* Comrs., 119 N. Car. 214, 25 S. E. R. 966.

[3] Campbell *v.* Kenosha, 5 Wall. 194.

authenticated by the certificates of the judges and clerks of election, are admissible in evidence. Proceedings of the city council, showing the result of such election reported to it and its resolution instructing the mayor to issue bonds, are also admissible to prove the same point. Such proof, together with proof that the city had admitted its liability upon the bonds issued by making arrangement for the payment of coupons as they fell due, receiving them in payment of the taxes and the like, is sufficient to show a ratification of the subscription by a vote of the majority of the tax-payers at an election called and held for that purpose.[1]

Unless power has been given by the legislature to a municipal corporation to grant pecuniary aid to railroad corporations, all bonds of municipalities, issued for such a purpose, and bearing evidence of their purpose on their face, are void, even in the hands of *bona fide* holders, whether the people voted the aid or not. Corporate ratification, without authority from the legislature, can not make a municipal bond valid which was void when issued for want of legislative power to make it.[2]

Municipal bonds, not originally authorized, but subsequently ratified by the legislature, will be held valid in the federal courts on the well settled doctrine of the supreme court of the United States, that in the absence of any constitutional restriction, the legislature of a state may, by retroactive statute, legalize the unauthorized acts and proceedings of subordinate municipal agencies where it might have previously authorized such acts and proceedings notwithstanding the decisions of the state supreme court adverse to such doctrine, rendered after the issue of the bonds and the passage of the curative act.[3]

§ 338. **When levy of taxes and payment of interest do not constitute a ratification.**—Where municipal officers had issued illegal bonds, and made a tax levy for the purpose of obtaining the interest thereon, and where the voters and tax-payers,

[1] City of Hannibal *v.* Fauntleroy, 105 U. S. 408.

[2] Lewis *v.* City of Shreveport, 108 U. S. 282; Parkersburg *v.* Brown, 106 U. S. 487.

[3] Dows *v.* Town of Elmwood, 34 Fed. R. 114; Bolles *v.* Town of Brimfield, 120 U. S. 759; Granada Co. *v.* Brogden, 112 U. S. 261.

at the first opportunity, repudiated the officers and repudiated the bonds, and refused to pay the interest to the bondholder or to levy any more taxes to pay such interest, it was held by the Kansas court of appeals that under the circumstances they had not ratified the issue of bonds.[1]

The rule that where bonds have been irregularly issued by the agents of a corporation the payment of interest on them for several years will amount to a ratification by the municipality, although the interest was raised by taxation, has no application to cases where there is a total want of authority on the part of the municipality to issue the obligations.[2]

§ 339. **Limitations upon the power of ratification.** — The general rule as to ratification is, therefore, subject to the limitation or qualification that, in order to be capable of ratification, the bonds must be such as to come within the constitutionally conferred powers of the municipality issuing them; and if the powers assumed to be conferred by the legislature were not such as it had the right to confer, for instance, if they were to be exercised in aid of a private instead of a public object, the bonds given to carry them out would be totally void and incapable of ratification by payment of interest or by the municipality participating in stockholders' meetings upon the stock acquired by them, or even by a vote of a majority of the suffrages.[3]

Thus, bonds of a city issued to a private corporation to aid in constructing and operating a foundry and machine shop are void, although their issue is ratified by a subsequent act of the state legislature.[4]

And the fact that interest has been paid on bonds which were issued in aid of a manufacturing enterprise of individuals, and, therefore, void, does not affect the rule as announced

[1] Falkenstein Township *v.* Fitch, 2 Kan. Ct. of App. 193.

[2] Cowdrey *v.* City of Caneadea, 16 Fed. R. 532; Parkersburg *v.* Brown, 106 U. S. 487; Thomas *v.* Town of Lansing, 14 Fed. R. 618; Stebbins *v.* Perry County, 167 Ill. 567, 47 N. E. R. 1048.

[3] Weismer *v.* Village of Douglass, 11 N. Y. S. C. (4 Hun) 201.

[4] Commercial Nat'l Bank of Cleveland *v.* Iloa City, 22 U. S. Sup. Ct. R. (Co-Op. Ed.) 463.

by the supreme court of the United States. We do not attach, said Chief Justice Miller, any importance to the fact that the city authorities paid one installment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was really unauthorized, can not create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose.[1]

In a late case the supreme court of the United States, in considering this subject, declared that where a municipal corporation was indebted to the full constitutional limit, bonds issued in excess of that limit are invalid, although issued to be sold and the proceeds to be applied to the original indebtedness. And the payment of installments of interest can not have the effect of ratifying bonds issued beyond the constitutional limit.[2]

The legislature has no power to validate bonds issued in violation of constitutional provisions, which are alive and in force at the date of the validating act.[3]

[1] Loan Association *v.* The City of Topeka, 20 Wall. (U. S.) 655. See, also, Union Bank *v.* Comrs., 119 N. Car. 214, 25 S. E. R. 966.

[2] Doon Tp. *v.* Cummins, 142 U. S. 366; Daviess Co. *v.* Dickinson, 117 U. S. 657.

[3] Quaker City National Bank *v.* Nolan Co., 59 Fed. R. 660; Cooley on Const. Lim., p. 457; Katzenberger *v.* Aberdeen, 121 U. S. 172.

CHAPTER XVI.

COUPONS.

§ 340. Form and nature of coupons.
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§ 340. **Form and nature of coupons.**—The express power of a municipal corporation to issue bonds bearing interest carries with it the power to attach to those bonds interest coupons.[1]

Coupons are usually in the form of express promises to pay to the bearer the interest due at a fixed time and place. It is not necessary that the holder of coupons, in order to recover on them, should own the bonds from which they are detached. The coupons are drawn so that they can be separated from the bonds, and, like the bonds, are negotiable; and the owner of them can sue without the production of the bond to which they were attached, or without being interested in them.[2]

But sometimes the coupon is a memorandum of the amount of interest due, stating the time and place of payment, but

[1] Atchison Board of Education *v.* De Kay, 148 U. S. 591.

[2] Thompson *v.* Lee Co., 3 Wall. 327; First National Bank *v.* Bennington, 16 Blatchford 53; County of Beaver *v.* Armstrong, 44 Pa. St. 63; National Exch. Bank *v.* Hartford, etc., R. Co., 8 R. I. 375, 5 Am. R. 582; *post*, § 350.

containing no promise to pay the interest. In such case it has been held that the coupon is not a complete instrument, and must be declared upon with reference to the bond.[1]

Sometimes coupons are issued in the form of promissory notes, or in the form of a bill of exchange, or draft, upon the treasurer of the corporation issuing them, or in the form of a check upon a bank, and draft or bill, with no drawee named. It is immaterial in what words the coupons are expressed, provided they indicate the amount due on the bond for interest at a particular time and place, as authority to the holder to receive it.

The contract for the payment of interest is usually set forth fully in the bond, while the coupons simply state the amount of interest due, with the time and place of payment. Where the coupon imperfectly states the interest contract, the coupon and bond must necessarily be construed together, and the terms of the bond will define and control the contract. So, it has been held that where the terms of the coupon are at variance with those of the bond, the latter will control in ascertaining the true terms of the interest contract.[2]

§ 341. **Signature to coupons.**—When the statute prescribes the mode in which bonds or coupons shall be executed, that mode must be followed. But in the absence of statutory provisions as to the persons who shall sign the coupons or bonds, they should be signed by the principal officers of the municipality. Where cities issue bonds and coupons, as a rule the mayor signs them and they are attested by the city clerk or some other officer of the municipality. Where counties issue such securities they are ordinarily signed by the commissioners or chairman of the board of commissioners and attested by the clerk. In case of bonds and coupons issued by a school district they should be signed by the trustees or president of the board and attested by the clerk. Coupons may be signed

[1] Woods *v.* Lawrence Co., 1 Black 386. See, also, Crosby *v.* New London, etc., R. Co., 26 Conn. 121; Jackson *v.* New York, etc., R. Co., 48 Me. 147.

[2] City of Kenosha *v.* Lamson, 9 Wall. 477; City of Lexington *v.* Butler, 14 Wall. 282; McClure *v.* Township of Oxford, 94 U. S. 429.

by a printed fac-simile of the maker's autograph, adopted by the maker for that purpose, though not expressly authorized by statute. Thus, bonds were issued by order of the county court and were signed by the presiding justice, and sealed with the seal of the county. The deputy clerk also signed the clerk's name, with the knowledge of the presiding justice. The bonds were afterwards destroyed and new bonds issued corresponding in style and date with the old ones. The old clerk being then out of office, his name was signed by the deputy, who had become the clerk, the signatures to the coupons being lithographed. The statute made no provision as to the mode of executing the bonds. The county paid interest on the new bonds, and received and retained a certificate of stock. The agent of the county participated in all the proceedings. It was held that the bonds were valid in the hands of a *bona fide* holder.[1]

It has been held that where the commissioners have power to issue coupons accompanying bonds, a statement in the bond that they have caused one of their number to sign the coupon is equivalent to the signing of the coupons by all of them.[2]

§342. **Payee not essential to the validity of coupons.**—The validity of a coupon is not affected by the fact that no payee is mentioned, for it is sufficiently evident from the general character of the instrument that it was issued as the binding obligation of the payor to the purchaser of the bonds, and was designated to be paid to him or to the bearer. Nor would it matter that it contains no words of promise. For while they may be necessary to constitute an ordinary promissory note, which without them may be a mere memorandum, the very form of the coupon clearly evinces an intention that it shall be an obligation to pay the amount designated, and the intention of the payor is what the law at all times seeks to enforce.[3]

[1] McKee *v.* Vernon Co., 3 Dill. (C.C.) 210; Pennington *v.* Baehr, 48 Cal. 565. See, also, Lynde *v.* The County, 16 Wall. 6.

[2] Phelps *v.* Town of Lewiston, 15 Blatchf. 131. See, also, Thayer *v.* Montgomery County, 3 Dill. 389.

[3] Woods *v.* Lawrence Co., 1 Black (U. S.) 386. See, also, Tiedeman on Commercial Paper, § 475; McCoy *v.*

§ 343. **Place of payment of coupons—May be made beyond the limits of a state.**—It is a settled doctrine of the supreme court of the United States that the power of a municipal corporation to make a contract does not depend upon the place of performance but upon the scope and object. Accordingly it has been held, in the absence of statutory provisions to the contrary, that it is competent for such a corporation to designate in its bonds or coupons some particular banking house, in New York or elsewhere beyond the limits of the corporation or municipality, as the place of payment.[1]

The supreme court of Illinois has adopted the rule that unless specially authorized to do so by statute, a municipal corporation can not bind itself to pay its indebtedness at any other place than at its treasury.[2]

§ 344. **Negotiability of coupons.**—Coupons containing words of negotiability, such as a promise to pay A. or order, or A. or bearer, or holder, or any similar language indicating an intention that the person in possession of the coupon is entitled to demand and receive payment of the amount specified in the coupon, are in legal effect promissory notes by the law merchant, and possess all the attributes of negotiable paper. They are in this respect subject to the same rules as the bonds to which they are attached. The title passes by delivery; the holder for value obtains an absolute title, although they may have been stolen from the true owner, provided he has no notice or knowledge of the theft. The holder takes them free from all equities attaching to them in the hands of the original parties, and is unaffected by any mere irregularities in their issue.[3]

Washington Co., 3 Wall. Jr. 381; Smith *v.* Clark County, 54 Mo. 58; Johnson *v.* County of Stark, 24 Ill. 75. But compare Enthoven *v.* Hoyle, 13 C. B. 372, 76 Eng. Com. L. 372; Everton *v.* Nat. Bank, 66 N. Y. 14; Wright *v.* Ohio, etc., R. Co., 1 Disney(Ohio), 465; Jackson *v.* York, etc., R. Co., 48 Me. 147.

[1] Thompson *v.* Lee Co., 3 Wall. 327; The City *v.* Lawson, 9 Wall. 478; Lynde *v.* The County, 16 Wall. 6; City of Lexington *v.* Butler, 14 Wall. 282; Evansville, etc., R. R. Co. *v.* City of Evansville, 15 Ind. 395.

[2] Prettyman *v.* County of Tazewell, 19 Ill. 406, 71 Am. Dec. 230; People *v.* County of Tazewell, 22 Ill. 147; Johnson *v.* County of Stark, 24 Ill. 75.

[3] Mercer Co. *v.* Hackett, 1 Wall. 83;

The purchaser of coupons is not a mere assignee of causes of action evidenced by the coupons, but he takes full title upon delivery, and the promise of the payor to pay the bearer is a promise to pay him, the purchaser.[1]

In New York, however, it has been held that where interest coupons or warrants are not made payable to bearer or order, they are not negotiable when separated from the bonds although the latter are themselves negotiable, and the purchaser of these detached instruments takes them subject to all defects in the title of his transferrer.[2]

But the negotiability of coupons is not affected by the fact that they are, by their own terms, declared to be for interest upon bonds specified by their numbers.[3]

Coupons for installments of interest, when severed from bonds, have been declared by the supreme court of the United States to be negotiable, and pass by delivery and bear interest from the day they are payable. And the failure to present the coupon for payment does not prevent the running of interest.[4]

So, it has been held by the supreme court that coupons detached from bonds are negotiable instruments.[5]

And coupons detached from the bonds, and payable to bearer, though overdue, are negotiable by the law merchant, when the bonds have not matured.[6]

Murray *v.* Lardner, 2 Wall. 110; Thompson *v.* Lee, 3 Wall. 327; Aurora City *v.* West, 7 Wall. 82; Clark *v.* Iowa City, 20 Wall. 583; Roberts *v.* Bolles, 101 U. S. 119; Town of Queensbury *v.* Culver, 19 Wall. 83; Comrs. of Knox Co. *v.* Aspinwall, 21 How. 539; City of Lexington *v.* Butler, 14 Wall. 282; Spooner *v.* Holmes, 102 Mass. 503, 3 Am. R. 491.

[1] City of Lexington *v.* Butler, 14 Wall. 282; Cooper *v.* Town of Thompson, 13 Blatchf. 434. See, also Thompson *v.* Perrine, 106 U. S. 589; Dudley *v.* Board, etc., 80 Fed. R. 672.

[2] Evertson *v.* National Bank of Newport, 66 N. Y. 14. But see Smith *v.* County of Clark, 54 Mo. 58; Mayor *v.* Potomac Ins. Co., 2 Baxt. (Tenn.) 296; Town of Queensbury *v.* Culver, 19 Wall. 83.

[3] Evertson *v.* National Bank, 66 N. Y. 14.

[4] Walnut *v.* Wade, 103 U. S. 683.

[5] Stewart *v.* Lansing, 104 U. S. 505.

[6] Thompson *v.* Perrine, 106 U. S. 589; Grand Rapids, etc., Co. *v.* Sanders, 54 How. Pr. (N. Y.), 214. But see Gilbrough *v.* Norfolk, etc., R. Co., 1 Hughes (C. C.) 410. But one who acquires a coupon after it has become due and dishonored takes it subject to equities and defenses which existed as against the previous holder. Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416; Martin *v.* Bank, 94 Tenn. 176; McKim *v.* King, 58 Md. 502.

§ 345. **The presentment of coupons for payment.**—A coupon is due and payable on the day fixed for the payment of interest on the bonds. Like a promissory note, payable on a certain day, it need not be demanded, as against the maker on that day, in order to preserve his liability, and, though in the form of a draft on a bank, neither demand nor notice is necessary to charge the drawer. The degree of diligence to be exercised by the holder of a coupon in presenting it for payment is to be ascertained by reference to the relations of the parties liable upon it.[1]

Thus, in a case before the supreme court of the United States from the state of Illinois, involving the validity of certain coupons issued by a township in aid of a railroad, on the trial of the cause in the court below, the plaintiff objected to the admission in evidence of the coupons sued on because they were not presented to the proper officers or demand of payment made thereon, and notice given to the drawer before the suit. The supreme court of the United States held that the objection was not tenable. The form of the coupons does not change their nature. They are evidences of the sums due for interest on the bonds. The fact that they are made payable at a particular place does not make a presentation for payment at that place necessary before suit can be maintained on them.[2]

In a case before the supreme court of the United States, in 1880, from the state of Alabama, in a suit upon certain coupons cut from county bonds, among other things a question was raised on the trial of the cause, as to whether the demurrer to the complaint, in the court below, should have been sustained, because it was not averred specially that the coupons sued on were presented to the court of county commissioners for allowance before the suit was brought. The statute of Alabama provides that county commissioners must audit all claims, and no

[1] Arents *v.* Commonwealth, 18 Gratt. 750; City of Jeffersonville *v.* Patterson, 26 Ind. 15; Langston *v.* South Carolina R. Co., 2 So. Car. 248; Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62.

[2] Walnut *v.* Wade, 103 U. S. 683; Wallace *v.* McConnell, 13 Pet. 136; Warner *v.* Rising Fawn, etc., Co., 3 Woods 514; Irvine *v.* Withers, 1 Stew. 234; Montgomery *v.* Elliott, 6 Ala. 701. See, also, Potomac Mfg. Co. *v.* Evans, 84 Va. 717.

suit can be brought upon a claim against the county until a presentment of the claim and the statutory provisions have been complied with. It was contended that the coupons came within the provisions of that statute. The bonds and coupons were signed by the judge of probate of the county, as the presiding officer of the commissioners' court, and were issued under the act to authorize the several counties, town and cities of Alabama to subscribe for the stock of railroads. The supreme court held that they were, in legal effect, themselves warrants on the treasury, given by the judge of probate after an allowance by the court of the claim of the railroad company for the payment of the county subscription, in accordance with the terms of the accepted proposal. The claim was, to all intents and purposes, audited by the court when the bonds were issued. The validity and amount of the liability were then definitely fixed and warrants on the treasury given, payable at a future date. The treasurer could pay them when due on presentation, without further action of the court, if he had funds on his hands applicable for that purpose. In his hands they would be good vouchers for money disbursed from that fund. The demurrer to the complaint was, therefore, properly sustained by the court below, and the judgment was accordingly affirmed.[1]

§ 346. **When demand of payment upon coupons not essential.**—That there were no funds in the county treasury available for their payment is a sufficient excuse for not presenting and demanding payment of coupons payable "on presentation."[2] And, as already shown in the last section, it is the general rule, in the class of cases therein referred to, that a demand is unnecessary before suit.

§ 347. **Presentment of coupons for payment to guarantors and indorsers essential.**—In New York it has been held that in order to charge an indorser of a coupon, the same strictness is essential as in case of other commercial paper. The coupon should be presented at maturity and the indorser duly notified

[1] County of Green *v.* Daniel, 102 U. S. 187.

[2] Wilson *v.* Neal, 23 Fed. R. 129; Tatum *v.* Ray, 69 Fed. R. 682.

of the dishonor of the paper which, by his indorsement, he undertook to pay if the maker thereof fails so to do. And if the coupon is otherwise described so as to identify it, it is not material that the number of the coupon was not stated in the notice of dishonor or non-payment.[1]

In the case of a guarantor the rule is somewhat different, arising from the nature of the contract, that of the surety or indorser being direct, or as it is expressed in some cases, the surety is an "insurer of the debt," the guarantor of "the solvency of the debtor." The guarantor undertakes to pay if, by due diligence, the debt can not be made out of the principal, the surety or indorser undertakes to pay on default of the principal. If the coupon is presented for payment when due, and notice of its dishonor given to the guarantor in a reasonable time thereafter, he is liable. Whether the coupon was presented in a reasonable time and notice given in a reasonable time depends very much upon the question whether the guarantor has sustained loss for failure to present the coupon on the day of maturity, and to give immediate notice of dishonor. The contract of guaranty varies very much, and while the rule just stated is the one usually governing such contracts, the guaranty may be in such form that the guarantor becomes liable immediately upon the default of the principal. Thus, where a state pledged its faith, "for the punctual payment of the interest and ultimate redemption of the principal" of the bonds of a city, it was held in construing the contract that the liability of the state was fixed as soon as default was made in the payment of the interest, and that it was only necessary to show that the city, upon demand, failed to pay any coupon, to make the state liable on its guaranty. Mr. Justice Joynes, speaking for the court, said: "The state has a right to claim that they shall be presented for payment within a reasonable time after they become payable, so that it may be relieved from its liability as guarantor; and the coupons on their face give notice of the guarantee. It can not be supposed that the state would be willing to incur the responsibility wholly indefinite

[1] Evertson *v.* National Bank, 66 114; Bonner *v.* City of New Orleans, N. Y. 14; Hodges *v.* Shuler, 22 N. Y. 2 Woods 135.

in point of time, which would be the case if the coupons were designed to circulate without any limit after the date of payment. It is no answer to say that the city of Wheeling has provided by a mortgage for the indemnity of the state. The security may be lost, or its value impaired by delay; and the state, by accepting that security, did not abandon the character of the guarantor and assume that of the principal debtor."[1]

The supreme court of the United States has held that the guarantee of the bonds embraced both the principal and interest. The payment of bonds without other designation always implies a payment of a principal sum and its incidents; and a guarantee in similar terms covers both. Thus a city having issued bonds to a gas company, under an ordinance providing that a gas company should guarantee the said bonds, and assume the payment of the principal thereof at maturity, it was held that the ordinance contemplated two undertakings by the company; one to the holder to answer for the city's liability; the other to the city to pay the bonds at their maturity. The indorsement of the president of the company on the bonds, guaranteeing "the payment of the principal and interest thereof," was a substantial compliance with the ordinance.[2]

§ 348. **As to days of grace on coupons.**—The authorities upon this subject are conflicting. Daniel, in his treatise on Negotiable Instruments, asserts that coupons are not entitled to grace. He contends that it is evident from the very nature of coupons, and of bonds to which they are attached, that the reasons out of which the allowance of grace is made upon mercantile paper do not apply to them. That they are instruments of investment and traffic, and not ordinarily used like bills and notes to effect exchanges.[3]

On the other hand, Burroughs, in his treatise on Public Securities, asserts that coupons are entitled to days of grace, just as other commercial paper payable on a given date, and

[1] Arents *v.* Commonwealth, 18 Grat. (Va.) 750.

[2] New Orleans *v.* Clark, 95 U. S. 644. But see Union Trust Co. *v.* Detroit, etc., Co. (Mich.) 76 N. W. R. 112.

[3] 2 Daniel on Neg. Inst., § 1536a; Arents *v.* Commonwealth, 18 Grat. (Va.) 750.

the purchaser, before the days of grace have expired, is a purchaser before maturity, and is not subject to the burden of a purchaser of overdue paper, although he may have purchased after the day named for payment.[1]

Jones, in his work on Railroad Securities, holds that coupons are entitled to grace the same as other commercial paper, and this is the view taken in a New York case.[2]

Mr. Justice Allen, in delivering the opinion of the court in this case, said: "It is probably true that they are regarded and treated, as well by promisor as promisee, as payable at the day, and paid as if in terms payable without grace; but this can not destroy the character or change the legal effect of the instruments, the interpretation of which is for the courts. It is only as negotiable commercial paper that the plaintiff, as a *bona fide* purchaser, could acquire a good title to the coupons from one having no title thereto; and he can only acquire such title by purchase under the same circumstances that would give him a title to other commercial paper; and if there were no days of grace for the payment of these coupons they could not be transferred so as to give a good title."

There seems to be no valid reason why coupons should not be entitled to days of grace the same as other negotiable instruments. They are intended to circulate, and do circulate, as negotiable instruments, with all the attributes of such commercial paper. The law merchant, commercial usage and custom have established the necessity and legality of grace as applied to negotiable instruments. It must, therefore, follow, as a logical conclusion, that if a coupon is a negotiable instrument, the same rules must apply and control in relation to days of grace as other commercial paper in the absence of statutory provisions to the contrary. The statute of California provides that no negotiable instrument is entitled to days of grace, and as a matter of course the law would be applicable to coupons.

However, the supreme court of Massachusetts, in a late case, after reviewing all the authorities on the subject, held that

[1] Burroughs on Pub. Sec., § 562.

[2] Jones on Corp. Bonds and Mort., § 245; Evertson *v.* National Bank, 66 N. Y. 14.

money bonds and interest coupons are not entitled to days of grace in that state.[1]

§ 349. **As to the effect of non-payment of overdue coupons.** —Overdue and unpaid coupons for interest attached to a negotiable bond, which has several years to run, do not render the bond and subsequently maturing coupons dishonored paper, so as to subject them in the hands of a purchaser for value to defenses good against the original holder. In one case, however, this doctrine seems to have been denied by the supreme court of the United States. The case arose in the state of Louisiana and involved the payment of certain railway bonds. The bonds had never been issued by the company but had been seized and carried away during the war. They were drawn payable to bearer either in London or New York or New Orleans, and the president of the company was authorized to fix the place of payment by his indorsement. When stolen they contained no such indorsement. They were offered for sale, and were sold for a very small consideration in the market of New York, with due and unpaid coupons for several years attached to them. The supreme court of the United States held that the absence of the required indorsement constituted a defect which deprived the bonds of the character of negotiability, and that the purchaser was affected with notice of their invalidity. Mr. Justice Bradley also asserted that the presence of the past-due coupons was an evidence of itself of dishonor sufficient to put the purchaser on inquiry.[2]

In the case of Cromwell *v.* Sac County, Mr. Justice Field said: "The non-payment of an installment of interest, when due, could not affect the negotiability of the bonds or of the subsequent coupons. Until their maturity, the purchaser for value, without notice of their validity as between antecedent parties, would take them discharged from all infirmities."[3]

[1] Chaffee *v.* Middlesex R. R. Co., 146 Mass. 224. See, also, Alabama, etc., Co. *v.* Robinson, 56 Fed. R. 690. Days of grace have been abolished by statute in many of the states, including New York.

[2] Parsons *v.* Jackson, 99 U. S. 434. See, also, Morton *v.* New Orleans, etc., R. Co., 79 Ala. 590.

[3] Cromwell *v.* County of Sac, 96 U. S. 51; National Bank *v.* Kirby, 108 Mass. 497; Boss *v.* Hewitt, 15 Wis. 260.

The doctrine as laid down in the case of Parsons *v.* Jackson was qualified in a later case by the supreme court.[1] In this case it was held, and may now be accepted as the law, that overdue and unpaid interest coupons attached to the bonds are not in themselves sufficient to put the purchaser on inquiry.

In another case Mr. Justice Swayne said: That bonds for the payment of money, with interest warrants attached, are everywhere encouraged as a safe and convenient medium for the settlement of balances among mercantile men; and any course of judicial decisions calculated to restrain or impede their free and unembarrassed circulation would be contrary to the soundest principles of public policy. Such instruments are protected in the possession of an indorsee, not merely because they are negotiable, but also because of the general convenience in commercial affairs.[2]

But the supreme court of Minnesota has held that the fact that when the plaintiff purchased the bonds it appeared from their face that the interest was overdue for several years and unpaid, was a suspicious circumstance sufficient to put the plaintiff on his guard. The bonds were thus dishonored on their face. The interest, equally with the principal, was a part of the debt which they were intended to secure, and it is not material whether a whole or a part of the debt was overdue. The fact that the coupons were payable on presentation would not relieve the plaintiff. An instrument payable at a certain time is overdue as soon as the time has passed, whether payable generally or at a specified place; and he who takes it by indorsement or delivery when overdue has no better title than the one from whom he received it.[3]

Eliminating the question, as to days of grace, a coupon becomes due upon the day fixed by the terms of the bond and

[1] Railway Co. *v.* Sprague, 103 U. S. 756. See, also, Morgan *v.* United States, 113 U. S. 476; Morton *v.* New Orleans, etc., R. Co., 79 Ala. 590; McElrath *v.* Pittsburgh, etc., R. Co., 55 Pa. St. 189; Grand Rapids, etc., R. R. Co. *v.* Sanders, 54 How. Pr. 214.

[2] Murray *v.* Lardner, 2 Wall. 110; Smith *v.* Sac County, 11 Wall. 139.

[3] First National Bank *v.* Co. Comrs., etc., 14 Minn. 77.

coupon for the payment of the interest represented by the coupon. It becomes due without a demand on presentation.[1]

§ 350. **The relation existing between the bond and coupon.** —The holder of coupons which refer to the bonds to which they belong is chargeable with notice of all the bonds contain. In contemplation of law a detached coupon is still, in a sense, a part of the bond, and the holder is bound by all the covenants contained therein.[2]

But as coupons or warrants for interest are drawn and executed in a form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each installment of interest, a suit may generally be maintained upon the coupons without the production of the bonds to which they have been attached.[3]

They are, however, to be taken in connection with the bonds to which they are annexed, and though not themselves negotiable instruments by the law merchant they follow the instrument to which they are attached, and when that is negotiable the coupons are negotiable. The obligation to pay the interest is to be found in the bond, not necessarily in the coupon. These are intended by the parties to be evidence of the debt in the hands of the holder, and proof of payment when in possession of the debtor. By the contract of the parties and the usage of the country, they are sufficient evidence of the debt to the holder as against the obligors of the bonds. The possession of them is *prima facie* evidence that the holder is the holder of the

[1] Arents *v.* Commonwealth, 18 Gratt. (Va.) 750; First National Bank *v.* Co. Com'rs, 14 Minn. 77; Jones on Railroad Securities, § 325.

[2] McClure *v.* Township of Oxford, 94 U. S. 429; McClelland *v.* Norfolk, etc., R. Co., 110 N. Y. 469, 1 L. R. A. 299, and note; Bailey *v.* County of Buchanan, 115 N. Y. 297; Silliman *v.* Fredericksburg, etc., R. Co., 27 Gratt. (Va.) 119.

[3] Com'rs of Knox Co. *v.* Aspinwall, 21 How. 539; Thompson *v.* Lee Co., 3 Wall. 327; Walnut *v.* Wade, 103 U.S. 683; Trustees of Internal Imp. Fund *v.* Lewis, 34 Fla. 424, 43 Am. St. R. 209; National Exchange Bank *v.* Hartford R. R. Co., 8 R. I. 375; County of Beaver *v.* Armstrong, 44 Pa. St. 63; Mayor *v.* Potomac Ins. Co., 2 Baxt. (Tenn.) 296; Welch *v.* First Div., etc., Railroad Co., 25 Minn. 314; Town of Cicero *v.* Clifford, 53 Ind. 191.

bond, or was so when they were cut off, and as such entitled to receive the interest.[1]

The fact that the coupons are declared to be for interest upon bonds specified by their numbers does not destroy their negotiability when separated from the bonds, or impair the title of one purchasing from another without the production of the bond.[2]

§ 351. **Interest on overdue coupons.**—Interest coupons, detached from bonds, payable to bearer at a specified time and place, are negotiable promises for the payment of money, and, therefore, subject, in the main, at least, to the same rules as bank bills and other negotiable instruments.[3]

Thus, certain coupons having been detached and sent to New York by express, on March 31, 1871, for presentation and payment, were on that day stolen from the express office, and on the 3d day of April following were purchased by the plaintiff in good faith at Albany. The purchaser was held to have acquired a valid title to them as against the true owner. The fact that the coupons were declared to be for interest upon bonds specified by their numbers does not destroy their negotiability when separated from the bond, or impair the title of one purchasing from another without production of the bond.[4]

A coupon for accrued interest, payable to bearer, is just as much a lien under the mortgage given to secure the bond as the bond itself; and it is just as much a lien after it is detached from the bond as before, and when held by another person as when held by the bondholder. The fact that the coupon is made payable to bearer shows that its severance from the bond was contemplated.[5]

[1] Smith *v.* Clark, 54 Mo. 58; McCoy *v.* Washington Co., 3 Wall. Jr. 381. See, also, City of Lexington *v.* Butler, 14 Wall. 282; State *v.* Spartanburg, etc., R. Co., 8 S. Car. 129; Mayor *v.* Potomac Ins. Co., 2 Baxt. (Tenn.) 296. But compare Evertson *v.* Nat. Bank, 66 N. Y. 14; Crosby *v.* New London, etc., R. Co., 26 Conn. 121.

[2] Evertson *v.* National Bank, 66 N. Y. 14.

[3] Clark *v.* Iowa City, 20 Wall. 583; Aurora City *v.* West, 7 Wall. 82; Walnut *v.* Wade, 103 U. S. 683; Hinckley *v.* Union Pac. R. R. Co., 129 Mass. 52.

[4] Evertson *v.* National Bank, 66 N. Y. 14.

[5] Miller *v.* Rutland, etc., R. R. Co.,

Coupons, after maturity, bear interest at the rate fixed by the law of the place where they are payable.[1]

But the fact that coupons are made payable at a particular place does not make a presentation for payment at that place necessary before a suit can be maintained on them.[2]

The supreme court of the United States has held that municipal bonds, with coupons payable to bearer, having by universal usage and consent all the qualities of commercial paper, a party recovering on the coupons is entitled to the amount of them with interest and exchange at the place where by the terms they are made payable.[3]

Coupons being written contracts for the payment of money, and, as a rule, negotiable, being made payable to bearer and passing from hand to hand as other commercial paper, it is quite apparent, on general principles, that they would draw interest after payment of the principal is unjustly neglected or refused.[4]

§ 352. **As to the rate of interest recoverable upon coupons after maturity.**—The supreme court of the United States has held, that where the local law allows the rate of interest to be fixed by a contract of the parties, the rule adopted in that court was to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for the cases where the parties themselves have fixed no rate.[5]

This is the rule adopted by the supreme court in the earlier cases in which this question was under consideration.[6]

Justice Swayne said that, where a different rule has been

40 Vt. 399; Sewall *v.* Brainerd, 38 Vt. 364; Gilbert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586; Champion *v.* Hartford, etc., Co., 45 Kan. 103, 10 L. R. A. 754; Union Trust Co. *v.* Monticello, etc., Co., 63 N. Y. 311; Haven *v.* Grand Junction R. Co., 109 Mass. 88.

[1] Pana *v.* Bowler, 107 U. S. 529; Gelpcke *v.* Dubuque, 1 Wall. 175.

[2] Walnut *v.* Wade, 103 U. S. 683.

[3] Gelpcke *v.* City of Dubuque, 1 Wall. 175; Town of Genoa *v.* Woodruff, 92 U. S. 502; Cromwell *v.* County of Sac, 96 U. S. 51; Amy *v.* Dubuque, 98 U. S. 470; Thompson *v.* Lee Co., 3 Wall. 327.

[4] Aurora City *v.* West, 7 Wall. 82. But see, where coupon is payable out of specific funds, United States Mortgage Co. *v.* Sperry, 138 U. S. 313.

[5] Holden *v.* Freedman Savings and Trust Co., 100 U. S. 72.

[6] Brewster *v.* Wakefield, 22 How. (U. S.) 118; Burnhisel *v.* Firman, 22 Wall. 170.

established, it governs, of course, in that locality. The question is always one of local law.[1]

Thus, a case arose in the supreme court of the United States from the state of Illinois, in 1880, involving the validity of certain bonds and unpaid coupons attached to them, issued by a municipality in that state. In that case the question under consideration was directly passed upon by the court. The bonds sued upon bore interest at the rate of ten per cent. per annum. In entering judgment, the court below included interest upon the bonds at that rate, from their maturity until the date of the judgment. This was assigned for error, because, there being no agreement in the bonds to pay interest after maturity, it was claimed that no interest at all should have been allowed on them after becoming due; but that if any interest was allowed, it should have been computed only at the rate of six per cent. per annum, which was the legal rate in Illinois. At the date that the bonds were sued on the law of Illinois fixed the rate of interest at six per cent. per annum, where it was not settled by the contract, but allowed parties to contract for any rate not to exceed ten per cent. per annum. The supreme court affirmed the judgment of the lower court, holding that where bonds by their terms, under the statute of Illinois, bear interest at the rate of ten per cent. per annum, in entering judgment upon them, interest may be included in that rate from their maturity until the date of the judgment, although the legal rate, when not settled by contract, is six per cent.[2]

The authorities upon this subject are conflicting in the various state courts. The doctrine that the rate of interest stipulated in the bond follows the contract until it is merged in a judgment, is, perhaps, supported by the weight of authority.[3]

[1] Holden *v.* Freedman Savings and Trust Co., 100 U. S. 72. See, also, Scotland Co. *v.* Hill, 132 U. S. 107; Cairo *v.* Zane, 149 U. S. 122.

[2] Ohio *v.* Frank, 103 U. S. 697.

[3] Cromwell *v.* County of Sac, 96 U. S. 51; Brannon *v.* Hursell, 112 Mass. 63; Beckwith *v.* Trustees of Hartford, etc., R. R. Co., 29 Conn. 268; Mariette Iron Works *v.* Lottimer, 25 Ohio St. 621; Etnyre *v.* McDaniel, 28 Ill. 201; Pruyn *v.* Milwaukee, 18 Wis. 367; Hand *v.* Armstrong, 18 Iowa 324; Kohler *v.* Smith, 2 Cal. 597; Mc-

§ 353. **The same subject—Illustrations.**—Thus a case arose in the supreme court of the United States in 1877, from the state of Iowa, in which this subject was considered and discussed by the court. The statute of Iowa on this subject provided that the rate of interest shall be six per cent. a year on money due on express contract unless a different rate be stipulated, and on judgments and decrees for the payment of money in such cases; but that parties may agree in writing for any rate of interest not exceeding ten per cent. per year, and that any judgment or decree thereon shall draw the rate of interest expressed in the contract. The bonds upon which suit was brought specified that they should bear interest at the rate of ten per cent. until maturity. The plaintiff claimed that they should draw the same rate of interest after maturity and that, under the statute of Iowa, the judgment should also bear ten per cent. interest. The court below allowed only seven per cent. on the bonds after maturity, that being the rate in New York, where the bonds were payable, and only six per cent. on the judgment. The supreme court held that in this ruling the court below erred. That by the settled law of Iowa as established by repeated decisions of her highest court, contracts drawing a specified rate of interest before maturity draw the same rate of interest afterwards.[1]

But the learned court declared that there are conflicting decisions in some of the states, though the preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment. The statutory rate of six per cent. in Iowa only applies in the absence of a different stipulated rate. As the judgment, in case of a stipulated interest in the contract, must bear the same rate, it could not have been intended that a different rate should be allowed between the maturity of the contract

Lane *v.* Abrams, 2 Nev. 199; Hopkins *v.* Crittenden, 10 Tex. 189; Brewster *v.* Wakefield, 22 How. 118; Langston *v.* S. Carolina R. R. Co., 2 So. Car. 248; Commonwealth of Virginia *v.* Chesapeake and Ohio Coal Co., 32 Md. 501; Lash *v.* Lambert, 15 Minn. 416; Searle *v.* Adams, 3 Kan. 515; Pearce *v.* Hennessey, 10 R. I. 223; Eaton *v.* Boissonnault, 67 Me. 540; Rilling *v.* Thompson, 12 Bush (Ky.) 310.

[1] Cromwell *v.* County of Sac, 96 U. S. 51.

and the entry of the judgment. The case of Brewster *v.* Wakefield[1] was cited as authority against the views herein expressed.

That case came from a territorial court, and arose under a statute which allowed parties to agree upon any rate of interest, however exorbitant, and only prescribed seven per cent., in the absence of such agreement. The supreme court, bound by no adjudication of the territorial court, and looking with disfavor upon the devouring character of the interest stipulated in that case, gave a strict construction to the contract of the parties. "The law of Minnesota (then a territory)," said the court, in that case, "has fixed seven per cent. per annum as a reasonable and fair compensation for the use of moneys; and when a party desires to extort, from the necessities of a borrower, more than three times as much as the legislature decrees reasonable and just, he must take care that the contract is so written, in plain and unambiguous terms; for with such a claim he must stand on his bond." The statute of Iowa only allows the parties, by their agreement, to stipulate for interest up to ten per cent. a year, a rate which has not been deemed extravagant or unreasonable in any of these states lying west of the Mississippi. "Be that as it may," said Justice Field, "the question is one of the local law under the statute of the state, and the constructions given by its tribunals should include us. The position of counsel, that because the rate of interest in New York, where the bonds are payable, is only seven per cent., the bonds can only draw that rate after maturity, is not tenable. When the rate of interest at the place of contract differs from the rate at place of payment, the parties may contract for either rate and the contract will govern."[2]

The bonds in this case were made with reference to the law of Iowa as to interest and not to that of New York, where interest above seven per cent. is deemed usurious and avoids the whole contract. With reference to interest on the coupons,

[1] Brewster *v.* Wakefield, 22 How. 118.

[2] Miller *v.* Tiffany, 1 Wall. 298; Depau *v.* Humphreys, 8 Mart. (N. S.) 1; Chapman *v.* Robertson, 6 Paige 627; Peck *v.* Mayor, 14 Vt. 33; Butter *v.* Olds, 11 Iowa 1.

after maturity, that can be allowed only at the rate of six per cent., under the law of Iowa. The learned justice, in conclusion, said: "It follows, from the views expressed, that the plaintiff was entitled to a judgment for the amount of four bonds, and the coupons in suit, with interest on the bonds after maturity until judgment, at the rate of six per cent. a year; and that the judgment should draw interest at the rate of ten per cent. a year upon the amount found due on the bonds, and at the rate of six per cent. a year upon the amount found due on the coupons, including the costs of the action."[1]

In a late case the supreme court of the United States, in passing upon this question, followed the settled doctrine of that court, in construing the question of the rate of interest on coupons on bonds legally issued under the constitution and laws of Illinois, that after their maturity, they bear interest at the rate fixed by the law of the place where they are made payable.[2]

§ 354. **Order of payment of coupons.**—Payment of coupons should generally be made in the order in which they fall due, and it is doubtless true that the holder may in equity claim payment in this order. It has sometimes been asserted, however, that a holder of coupons separated from the bonds should be paid before the bondholder, because that would be the order of payment if the bonds and coupons were held by the same parties.

The questions as to the order of payment usually occur when there is a sale of the property of the corporation under mortgage, and the assets are not sufficient to pay all the debts, and where the past due coupons have been separated from the bonds and are held by others than the owners of the bonds to which they were once attached. In such cases the ordinary rule between debtor and creditor is reversed; the holders of

[1] Cromwell *v.* County of Sac, 96 U. S. 63. See, also, Langston *v.* South Car. R. Co., 2 S. Car. 248; Spencer *v.* Pierce, 5 R. I. 63.

[2] Cairo *v.* Zane, 149 U. S. 122; Pana *v.* Bowler, 107 U. S. 529; Walnut *v.* Wade, 103 U. S. 663; Ohio *v.* Frank, 103 U. S. 697; Knox Co. *v.* Aspenwall, 21 How. 539; White *v.* Vermont, etc., R. R. Co., 21 How. 575; Gelpcke *v.* Dubuque, 1 Wall. 175.

the coupons are treated simply as debtors of the corporation, and not as debtors of a privileged class; the coupons and bonds are paid *pro rata* or *pari passu*.[1]

The principle was applied in a case where, upon default in payment of interest, the mortgage on railroad property provided for a sale and payment of both principal and interest, although the bonds at the time of sale had many years to run before they matured. Coupons and bonds were paid alike, no distinction being made.[2]

Where the president of a railroad paid the coupons maturing on its bonds at the office of the company, with the understanding that they were not to be extinguished, but to be held by him in lieu of those who presented them, in a distribution of the proceeds of a sale of mortgaged property securing the bonds, it was held by the supreme court of Massachusetts that the president was allowed the amount of the coupons paid by him, with interest, against a surplus of the proceeds of sale remaining after a full satisfaction of the claims of all other creditors.[3]

Coupons severed from negotiable bonds are not entitled to priority of payment over the principal of the bonds or coupons subsequently maturing unless the mortgage expressly provides for such priority.[4]

Sometimes the question arises whether the transaction, when coupons are paid, amounts to payment or is a mere purchase, by which they are kept alive for the benefit of the purchaser, and this depends upon the circumstances of the particular case. Thus, where the party paying does it under agreement of the obligor of the bond advancing the money and holding the coupons as security, but without the consent of the holder, the security for the coupon is not kept alive as against the bondholder. On the other hand, where the party undertakes to

[1] Miller *v.* Rutland & Washington R. R. Co., 40 Vt. 399; Sewall *v.* Brainard, 38 Vt. 361; State *v.* Spartanburg R. Co., 8 So. Car. 129. But see Stevens *v.* New York, etc., R. Co., 13 Blatch. 412.

[2] Dunham *v.* Cincinnati and Penna. R. R. Co., 1 Wall. 254.

[3] Haven *v.* Grand Junction R. R. Co., 109 Mass. 88.

[4] Dunham *v.* Cincinnati Railroad Co., 1 Wall. 254.

purchase for his own use, and does so purchase, he stands on the same footing as the original holder.[1]

In a late case in the supreme court, Mr. Justice Lamar said: "The case of Ketchum *v.* Duncan clearly settles the proposition that in such a matter as this, the question, as between payment and purchase, is one of fact rather than one of law to be settled by the evidence, largely presumptive, generally in a case. It is a question of the intention of the parties."[2]

[1] Ketchum *v.* Duncan, 96 U. S. 659.

[2] Wood *v.* Guarantee Trust & Safe Deposit Co., 128 U. S. 416. See, also, Union Trust Co. *v.* Monticello, etc., R. Co., 63 N. Y. 311; Com. *v.* Chesapeake, etc., R. Co., 32 Md. 501; Lloyd *v.* Wagner, 93 Ky. 644, 21 S. W. R. 334; Fidelity, etc., Co. *v.* West, etc., R. Co., 138 Pa. St. 494, 21 Atl. R. 21; 2 Elliott R. R., § 487.

CHAPTER XVII.

MUNICIPAL WARRANTS.

§ 355. Power to issue warrants.
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370. Validity of warrants issued for special services.
371. The rights of parties who lose a warrant or order.

§ 355. **Power to issue warrants.**—A municipal warrant or order is an instrument generally in the form of a bill of exchange or order drawn by an officer of a municipality upon its treasurer, directing him to pay an amount of money specified therein to the person named, or his order, or to bearer. The power to issue warrants, and the mode in which it is to be exercised are usually prescribed by charter or statute. The supreme court of the United States has declared that they are vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the use of the city, orders or drafts drawn by one city officer upon another or any other device of the kind used for liquidating the amount legitimately due the public creditors; and are, of course, necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes, out of which they must be paid.[1]

[1] Mayor *v.* Ray, 19 Wall. 468.

The power to issue such warrants or orders may, where not expressly conferred or denied, be implied as incidental to carrying out the objects of a municipal or public corporation.[1]

Warrants issued by a board of county commissioners for a purpose not within their jurisdiction are void and do not bind the county.[2]

County warrants issued for the purpose of erecting a county court-house in the state of Nebraska are void where their issue was not authorized by a vote of the qualified electors of the county, and no benefit whatever resulted to the county from the issuing of such warrants.[3]

A municipal corporation may anticipate the revenues of the year and in payment of a debt, whether antecedent or one presently contracted, issue time warrants payable at such time during the current year as the revenues may reasonably be expected to be collected.[4]

§ 356. **Form, nature and mode of issue.**—The payment of claims against municipalities is generally made by means of a warrant or order issued by the proper officers upon the treasurer in favor of the debtor. These warrants or orders are in the ordinary form of commercial paper, directing the payment to debtor, or his order, or to bearer. While these warrants or orders have the form of commercial paper, they do not possess the qualities of such paper. They are regarded as orders of the corporation on itself, and, in substance, the mere promise of the municipality to pay the amount specified, and they are liable to all the equities existing, or attaching to the original transaction. To be valid, such warrants or orders must be

[1] Comrs. of Shawnee County *v.* Carter, 2 Kan. 115; Mayor *v.* Ray, 19 Wall. 468, 477.

[2] Oakley *v.* Valley Co., 40 Neb. 900; Walsh *v.* Rogers, 15 Neb. 309.

[3] Brown *v.* Comrs. of Sherman Co., 5 Fed. R. 274. See, also, Long *v.* Boone County, 32 Iowa 181; Hooper *v.* Ely, 46 Mo. 505.

[4] City of Burrton *v.* Harvey Co. Savings Bank, 28 Kan. 390; City of Wyandotte *v.* Zeitz, 21 Kan. 649. It has been held that a warrant drawn upon the general fund in one year may be received in payment of taxes for a subsequent year. Western, etc., Co. *v.* Lane, 7 S. Dak. 599, 65 N. W. R. 17; Reynolds *v.* Norman, 114 Mo. 509, 21 S. W. R. 845.

drawn and signed by the proper officials, and such authority can not be delegated.[1]

Statutes prescribing the form in which warrants are to be drawn are merely directory. If they contain the words prescribed by the statute, it has been held that additional words will not necessarily destroy their effect.[2]

The duties and powers of the officers of the municipal corporation are prescribed by statute, and every person dealing with them as such may know, and is charged with a knowledge of the nature of these duties and the extent of these powers; and the want of corporate power, or the want of authority in the municipal officers, can not be supplied by their unauthorized action or representation. Warrants drawn by the proper officers of a municipal corporation on the treasurer thereof are not bills of exchange, but are, in legal effect, the promissory notes of the corporation.[3]

Where the laws make it the duty of an officer to issue a warrant, he has no discretion in the matter; the act is purely a ministerial duty. Thus, it has been held that where the county supervisors have power to order the issue of warrants, the county auditor can not refuse to draw a warrant, when ordered to do so, because there is no money in the treasury, nor because the order does not state the fund upon which the warrant is to be drawn, or because the person in whose favor it is ordered drawn has committed a fraud upon the county. But he may refuse to issue warrants which are void on their face.[4]

[1] Hubbard *v.* Town of Lyndon, 28 Wis. 674; Gilstrap *v.* St. Louis, etc., R. R. Co., 50 Mo. 491; Saline County *v.* Wilson, 61 Mo. 237; Fairchilds *v.* Ogdensburgh, etc., R. R. Co., 15 N.Y. 337; Newgass *v.* City of New Orleans, 42 La. Ann. 163; Dennis *v.* Table Mountain Water Co., 10 Cal. 369.

[2] Burton *v.* Harvey County Savings Bank, 28 Kan. 390; Young *v.* Camden Co., 19 Mo. 309.

[3] Clark *v.* City of Des Moines, 19 Iowa 199; Fairchilds *v.* Ogdensburgh, etc., R. R. Co., 15 N. Y. 337; Miller *v.* Thomson, 3 Man. & Gr. 576.

[4] Campbell *v.* County of Polk, 3 Iowa 467; Comrs. of Shawnee Co. *v.* Carter, 2 Kan. 115; Trustees of Paris Tp. *v.* Cherry, 8 Ohio St. 565; Merkel *v.* Berks Co., 81½ Pa. St. 505; Babcock *v.* Goodrich, 47 Cal. 488. See, also, Merrill on Mandamus, § 105; Evans *v.* McCarthy, 42 Kan. 426; State *v.* Clinton, 28 La. Ann. 47. But there is conflict as to whether he must issue a warrant where there are no funds. See Gilbert *v.* Moody, 2 Idaho 747, 25 Pac. R. 1092; People *v.* Tremain, 29 Barb. 96; State *v.* Jurmel, 30 La. Ann. 339; Carr *v.* State, 127 Ind. 204.

Where the law makes it the duty of the county auditor at a certain time to draw his warrant on the county treasurer, it is his duty to do it without waiting for request from the person entitled to it.[1]

But under the statute of Mississippi, requiring an order of the board of supervisors allowing a claim against the county to be entered on the minutes, specifying the amount allowed, the page, and the section of the law under which the allowance is made, etc., and the clerk to issue a warrant for the amount, it has been held that the clerk was justified in refusing to issue such warrant where the order failed to state the names of the parties and the section of the law, as required by the statute.[2]

It has been held in Indiana that, in drawing warrants upon the county treasurer for the several funds in his hands, apportioned to the several townships, the county auditor does not act as the agent of the county, but as a governmental agent for the benefit of the townships, and, not being drawn to satisfy a county or corporate obligation, they create no liability against the county.[3]

The supreme court of the United States has held that where warrants on a county treasurer are required by statute to be sealed with the county seal, no warrant is a genuine county warrant unless it bears the impress of the county seal.[4]

A warrant is not "issued," within the meaning of the Kansas statute of 1889, until it has been delivered.[5]

§ 357. **Negotiability of warrants.**—Municipal bonds, as stated in the previous chapter, are clothed with all the attributes of commercial paper, pass by delivery or indorsement, and are not subject to equities, where the power to issue them exists, in the hands of *bona fide* holders for value before due, without notice. But warrants or orders issued by cities, towns, counties or school districts for ordinary municipal expenses

[1] Wilson *v.* Neal, 23 Fed. R. 129.

[2] Land *v.* Allen, 65 Miss. 455, 4 So. R. 117.

[3] Vigo Tp. *v.* Board, etc., of Knox Co., 111 Ind. 170, 12 N. E. R. 305.

[4] Smeltzer *v.* White, 92 U. S. 390. See, also, Springer *v.* County of Clay, 35 Iowa 241; Heffleman *v.* Pennington County, 3 S. Dak. 162, 52 N. W. R. 851.

[5] State *v.* Pierce, 52 Kan. 521, 35 Pac. R. 19.

are not intended to have the qualities of commercial paper, but are instruments authorized for convenient use in conducting the current and ordinary business of such municipalities, and as a means of anticipating their ordinary revenue. It would overwhelm municipalities with ruin to hold that such warrants or orders have the qualities of negotiable paper, especially that quality which protects an innocent holder for value from defenses of which he has no notice, actual or constructive. All holders of such warrants or orders, even when payable to order or bearer, stand in the shoes of the payee, and their rights and remedies are often essentially different from those of the holders of authorized negotiable municipal bonds. Such is the sound doctrine, and such is the doctrine of the authorities almost without exception.[1]

The supreme court of the United States, in an important case, involving the implied power to issue such securities, speaking by Mr. Justice Miller, declared: "The power to issue such obligations, and thus irretrievably to entail upon counties, parishes and townships a burden for which, perhaps, they have received no just consideration, opens the doors to immense frauds on the part of petty officials and scheming speculators. It seems to us to be a question quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justice and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the city or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing

[1] Bardsley *v.* Sternberg 18 Wash. 612, 49 Pac. R. 499; West Phila., etc., Co. *v.* City of Olympia (Wash.), 52 Pac. R. 1015; Emery *v.* Mariaville, 56 Me. 315; Shirk *v.* Pulaski Co., 4 Dillon 209; Clark *v.* Des Moines, 19 Ia. 199; Clark *v.* Polk Co., 19 Ia. 248; Matthis *v.* Cameron, 62 Mo. 501; People *v.* Board, 11 Cal. 170; Sturtevant *v.* Liberty, 46 Me. 457; Andover *v.* Grafton, 7 N. H. 298; Great Falls Bank *v.* Farmington, 41 N. H. 32; Hill *v.* City of Memphis, 134 U. S. 198, 204, 10 Sup. Ct. R. 562; Smith *v.* Inhabitants of Cheshire, 13 Gray 318; Van Akin *v.* Dunn (Mich.), 75 N. W. R. 938; Bank of Santa Cruz Co. *v.* Bartlett, 78 Cal. 301, 20 Pac. R. 682.

unimpeachable paper obligations, which may be multiplied to an indefinite extent. It would be an anomaly justly to be deprecated for all our limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issue, capable of floating about in the financial whirlpools of our great cities."[1]

§ 358. **The same subject—Illustrations.**—The law relating to this subject was fully considered and discussed by the supreme court in the case of the Mayor of Nashville *v.* Ray.[2]

That case involved the validity of certain city warrants or certificates of indebtedness. The court, speaking through Mr. Justice Bradley, said: "Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and instruments of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose." And again: "Every holder of a city order or certificate knows that, to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts can not create an estoppel against the the city itself, its tax-payers or people. Persons receiving it

[1] Police Jury *v.* Britton, 15 Wall. 566. See, also, Flagg *v.* Parish, etc., 27 La. Ann. 319.

[2] The Mayor *v.* Ray, 19 Wall. 468.

from them know whether it was issued, and whether they received it, for a proper purpose and a proper consideration. Of course they are affected by the absence of these essential ingredients; and all subsequent holders take *cum onere*, and are affected by the same defect."

A case arose in the supreme court of the United States in 1880, from the state of Arkansas, involving the validity of certain county warrants, which were drawn by the clerk of the county upon its treasurer, in favor of one Frank Gallagher, and transferred by him to Charles L. Wall, the plaintiff in the action. The following is a copy of one of them. The others were of like tenor and effect, though some of them were for only twenty dollars:

"$50. No. 804.

"The treasurer of the county of Monroe will pay to Frank Gallagher, or bearer, the sum of fifty dollars, out of any money in the treasury for general county purposes and not otherwise appropriated.

"Given under my hand at office, in Clarendon, Ark., this 15th day of September, 1875. W. S. Dunlap, Clerk."

The court held that the warrants, being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, when held by a *bona fide* purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferree takes them subject to all legal and equitable defenses which exist to them, in the hands of such payee. "There has been," said Mr. Justice Field, "a great number of decisions in the courts of the several states upon instruments of this kind, and there is little diversity of opinion respecting their character. All the courts agree that the instruments are mere *prima facie* and not conclusive evidence of the validity of the allowed claims against the county by which they were issued. The county is not estopped from questioning the legality of the claim; and when this is conceded, the

instruments conclude nothing as to other demands between the parties."[1]

Certificates of indebtedness issued by the District of Columbia, called sewer certificates, were held by the supreme court of the United States to be, in no sense, money, or the equivalent of money, and to have no validity unless issued for a purpose authorized by law, and not to have the character of commercial paper so as to render them, when fraudulently issued, valid in the hands of *bona fide* holders.[2]

Warrants or orders drawn by one municipal officer upon another in the disbursement of the funds of the municipality and payment of its indebtedness are not regarded as commercial or negotiable paper, cutting off equities against the corporation. Hence, a county order does not possess the essential qualities of commercial paper. When countersigned and registered by the treasurer, it is at once due without presentment, and whether assigned or not is always open to any defense proper against the original payee.[3]

§ 359. **Presentment of warrants for payment.**—The supreme court of Maine has held that it is essential that a warrant should be presented for payment, and payment refused and notice of dishonor given before an action can be maintained upon it. Chief Justice Mellen, in delivering the opinion of the court, said: "Persons transacting business according to an established and well-known usage are presumed to assent to such usage, and contract in reference to it. Now it is universally understood that selectmen, who draw an order on behalf of their town in favor of their creditors, have not the funds of the town in their hands, but they are in the possession of the treasurer. When any creditor of a town receives an order on the treasurer for the amount due him he must be

[1] Wall *v.* County of Monroe, 103 U. S. 74; Ouachita Co. *v.* Walcott, 103 U. S. 569.

[2] District of Columbia *v.* Cornell, 130 U. S. 655.

[3] The People *v.* Johnson, 100 Ill. 537; The Mayor *v.* Ray, 19 Wall. 468; Dana *v.* San Francisco, 19 Cal. 486; People *v.* Board, etc., of Eldorado Co., 11 Cal. 175; Clark *v.* Polk Co., 19 Iowa 248; Clark *v.* City of Des Moines, 19 Iowa 199; Hyde *v.* County of Franklin, 27 Vt. 185.

considered as understanding these facts, and assenting to this mode of receiving payment, and as accepting an order under an implied engagement to conform to the established usage, and present the order to the treasurer for payment. Good faith requires him to do this, and the law considers him as promising so to do. If, on presenting the order, payment be refused, the town which drew the order on itself must be answerable instanter, for the reason before assigned. But no sound reason can be given why a town should be subjected to the perplexity and costs of an action, before the payee of an order will give himself the trouble to do his duty and request payment of the money due him, according to the terms of it."[1]

An action can not be maintained on warrants drawn on a municipal treasurer, without allegation and proof of their presentment to him, or facts which will excuse the presentation.[2]

The supreme court of the United States has held that where the statute required that warrants not presented after due notice shall no longer exist as debts against the county, a failure to present them after such notice constitutes a good defense to them.[3]

But it has been held in New York that a corporation will not be discharged from liability by the omission to make presentment, if it can be shown that it has neither suffered nor can suffer any injury from the omission.[4]

§ 360. **As to the liability of an indorser on warrants.**—The supreme court of New York has held that warrants or orders of a municipal corporation for the unconditional payment of money to a person named, or order, or to bearer, have the

[1] Varner *v.* Nobleborough, 2 Me. 121; Benson *v.* Carmel, 8 Me. 110; Willey *v.* Greenfield, 30 Me. 452.

[2] City of Central *v.* Wilcoxen, 3 Colo. 566; East Union Tp. *v.* Ryan, 86 Pa. St. 459. See, also, City of Pekin *v.* Reynolds, 31 Ill. 529, 83 Am. Dec. 244; Dalrymple *v.* Town of Whitingham, 26 Vt. 346.

[3] County of Ouachita *v.* Wolcott, 103 U. S. 559.

[4] Kelley *v.* Mayor of Brooklyn, 4 Hill (N. Y.) 263; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94; Harker *v.* Anderson, 21 Wend. 373. See, also, Fairchild *v.* Ogdensburgh, etc., R. Co., 15 N. Y. 337; Tiedeman Commerc. Paper, § 128.

character of negotiable paper, so far at least as to render parties indorsing them liable as indorsers.[1]

In California it has been held that where a warrant is regarded as a mere voucher, the transferree is not an indorser, in the commercial sense of the word, and not liable as such, but that in case the warrant was not valid according to its purport, he would be liable to return the consideration.[2]

So, it has been held in California that a county warrant has not the qualities of a negotiable paper, and the plaintiff stands in the shoes of his assignor, the original holder.[3]

The supreme court of Illinois has held that notwithstanding warrants are not negotiable when they are negotiable in form, they must be indorsed to clothe the assignee with a legal title.[4]

An assignment of a county order, however, is valid to pass the legal title of the payee, so as to enable the assignee to sue in his own name.[5]

Where a municipal corporation is indebted to a party and issues to him a warrant therefor, an assignment of such a warrant operates as an equitable transfer of the indebtedness, and this, notwithstanding from some technical omission the warrant itself is invalid.[6]

§ 361. **Warrants payable out of a particular fund.**—Where by law a claim is against a particular fund, and is to be paid out of that fund, a warrant or order issued for such purpose should be payable out of such fund. When warrants or orders are drawn payable out of a particular fund, they create no general liability against the municipality upon which an ac-

[1] Bull *v.* Simms, 23 N.Y. 570; Hodges *v.* Schuler, 22 N. Y. 114.

[2] Keller *v.* Hicks, 22 Cal. 457; Dana *v.* City, etc., of San Francisco, 19 Cal. 486; Kreutz *v.* Livingston, 15 Cal. 344. See Smeltzer *v.* White, 92 U. S. 390.

[3] Bank of Santa Cruz Co. *v.* Bartlett (Cal.), 78 Cal. 301, 20 Pac. R. 682.

[4] Garvin *v.* Wiswell, 83 Ill. 215.

[5] The People *v.* Johnson, 100 Ill. 537; Clark *v.* City of Des Moines, 19 Iowa 199; Clark *v.* Polk Co., 19 Iowa 248; Willey *v.* Inhabitants of Greenfield, 30 Me. 452; Sturtevant *v.* Inhabitants of Liberty, 46 Me. 457; Emery *v.* Mariaville, 56 Me. 315; Town of Hackettstown *v.* Swackhamer, 8 Vroom (N. J.) 191; Knapp *v.* Mayor, etc., of Hoboken, 10 Vroom (N. J.) 394; Mayor *v.* Ray, 19 Wall. 468.

[6] School Dist. *v.* Dudley, 28 Kan. 160.

tion may be maintained by the holder. A municipality in such cases is only liable for the proper administration of the fund, and when that is exhausted its liability to the holder ceases.[1]

Thus, a warrant or order containing these words, "and charge the same to the account of Union Avenue," is payable out of the particular fund designated, and is not a general liability against the municipality.[2]

In Missouri, where a warrant was made payable out of "The road and canal fund," which had ceased to be available for the purpose of discharging the warrant, having been diverted from the county by legislative enactment, it was held that, in order to make the county liable, it must be shown that the county had received the fund and applied it to other uses than called for by the warrant. The diversion of the fund by the legislature created no liability on the general funds of the county.[3]

In the case of Argenti *v.* San Francisco, where the warrants had been drawn on a particular fund, the court declared that they can not be regarded as bills of exchange or promissory notes. The designation of the fund was not intended as a mere direction to the treasurer, and such was not its legal effect. He had no discretion as to the mode or means of payment. He was required to pay from the moneys belonging to the fund mentioned in the warrants, and was not at liberty to resort to any other fund for that purpose. The failure to pay them did not alter their nature or so change their legal effect as to render them the proper subjects of an action.[4]

[1] Bd., etc., of Tippecanoe Co. *v.* Cox, 6 Ind. 403; Campbell *v.* Polk Co., 49 Mo. 214; Boro *v.* Phillips Co., 4 Dillon 216; Winston *v.* City of Spokane, 12 Wash. 524, 41 Pac. R. 888; Wilson *v.* City of Aberdeen (Wash.), 52 Pac. R. 524; McCullough *v.* Mayor, 23 Wend. (N. Y.) 458; People *v.* Wood, 71 N. Y. 371; Diggs *v.* Lobsitz, 4 Okla. 232, 43 Pac. R. 1069; Argenti *v.* San Francisco, 16 Cal. 255. But see Minor *v.* Loggins, 14 Tex. Civ. App. 15, 37 S. W. R. 1086. It has been held, however, that such a warrant may be made payable in gold. Kenyon *v.* City of Spokane, 17 Wash. 57, 48 Pac. R. 783.

[2] Lake *v.* Trustees of Williamsburgh, 4 Denio (N.Y.) 520; Cuyler *v.* Trustees, etc., of Rochester, 12 Wend. 165; Steele *v.* Davis Co., 2 Greene (Ia.) 469.

[3] Kingsberry *v.* Pettis County, 48 Mo. 209.

[4] Argenti *v.* San Francisco, 16 Cal. 255; Martin *v.* San Francisco, 16 Cal. 285.

The charter of the city of Denver divides sewers into three classes—public, district and private—and provides that the cost of public sewers shall be met by an appropriation out of the public revenue. The only provision made for the payment of the cost of district sewers is by special assessments against the lots of the district, to be collected as other taxes. It also requires a warrant drawn by the city authorities to specify on what funds they are payable. It was held that, on the presumption that officers do their duty, a warrant not expressed as payable out of the public sewer fund, but "out of the Twentieth-street sewer fund, on account of the Twentieth-street sewer cont.," is drawn on a particular district fund, and that the city could not be sued thereon without an allegation that there was money in that fund to pay it.[1]

But the city may be liable where it negligently fails to create or collect the special fund to pay a warrant as it is required to do.[2]

And it has been held that a city treasurer may be compelled to pay part of a warrant drawn against a particular fund, although there is not money enough therein at the time to pay the whole of it.[3]

§ 362. **The same subject—Illustrations.**—In 1858 the legislature of Louisiana adopted a system of drainage for the city of New Orleans, the work to be controlled by commissioners, and the expense to be defrayed by assessments on the land benefited. A statute abolished the boards of commissioners and entrusted the control of the work to the board of administrators of the city. The assessments collected were to be used only as a drainage fund, and the expenses paid by warrants

[1] Travelers' Ins. Co. *v.* City of Denver, 11 Colo. 434, 18 Pac. R. 556. Compare Lake *v.* Trustees of Williamsburgh, 4 Den. 520.

[2] Denny *v.* City of Spokane, 79 Fed. R. 719; Reilly *v.* City of Albany, 112 N. Y. 30; Bank *v.* Port Townsend, 16 Wash. 450; Commercial Nat. Bank *v.* City of Portland, 24 Ore. 188, 33 Pac. R. 532. But see and compare Soule *v.* City of Seattle, 6 Wash. 315; Stephens *v.* City of Spokane, 11 Wash. 41, 39 Pac. R. 266; Cloud *v.* Town of Sumas, 9 Wash. 399, 37 Pa. 305; McEwan *v.* City of Spokane, 16 Wash. 212, 47 Pac. R. 433; Elliott on Roads and Streets, 436.

[3] Potter *v.* Black, 15 Wash. 186, 45 Pac. R. 787. See, also, Cloud *v.* Lawrence, 12 Wash. 163.

payable therefrom. A constitutional amendment taking effect afterwards prohibited the city from increasing its indebtedness, but allowed the increase of the debt of the drainage fund. Warrants to complainants were drawn on the drainage fund after the adoption of said amendment. It was held that the city could not be made liable for the amount of the warrants as a municipal corporation, for management of the drainage fund whereby a deficit occurred, so as to increase its general indebtedness.[1]

The same rule, it was held, applied to warrants issued for the purchase of machinery authorized by a statute which required payment to be made by warrants on the drainage fund.[2]

But there is a distinction between warrants which are drawn payable out of a particular fund, and those which evidence general corporate liability, but are directed to be charged against a particular account. The former create no general liability against the municipality, while the latter may do so.[3]

In Wisconsin where the statute conferred no authority to create separate or distinct funds, and all funds that come into the treasury are treated as one fund, out of which all liabilities are to be discharged, according to the order in which they are presented to the treasurer, an order payable "out of the unappropriated moneys belonging to the county for jail purposes," was held not to be payable out of a particular fund.[4]

A city council can not divide the amount levied for general city purposes into separate funds, and appropriate it for the payment of warrants issued in any particular year, so as to deprive the holder of warrants on the general fund, issued in the year previous, of the right to apply the same to the payment of his city taxes.[5]

Where void city warrants are ratified by a vote of the people, the city council can not provide for their payment out of

[1] Peake *v.* City of New Orleans, 38 Fed. R. 779.

[2] Peake *v.* City of New Orleans, 38 Fed. R. 779.

[3] Clark *v.* City of Des Moines, 19 Iowa 198. See, also, Kelley *v.* Mayor, etc., of Brooklyn, 4 Hill 263; Pease *v.* Inhabitants of Cornish, 19 Me. 191.

[4] Montague *v.* Horton, 12 Wis. 688.

[5] Western Town Lot Co. *v.* Lane, 7 S. Dak. 599, 62 N. W. R. 982, 65 N. W. R. 17.

a fund other than that on which they are drawn without creating such fund.[1]

The Nebraska statute requires the usual levy of taxes for county purposes to be made upon an estimate prepared by the board of county commissioners. Such estimate may, if necessary, include outstanding warrants of preceding years; but where it does not, the fund arising from the levy of that year can not be legally used to pay the warrants of preceding years, at least until all of the expenditures contemplated by the yearly estimate have been met.[2]

In Oklahoma city warrants, duly registered and not paid for want of funds but afterwards included in funding bonds issued under the act of March 8, 1895, are payable only out of the fund realized from such bonds. Such fund is a special trust fund for that purpose and can not be diverted therefrom, but until it is realized payment of the warrants is necessarily suspended.[3]

§ 363. **The rule in respect to interest on warrants.**—The rule in respect to interest on debts against municipal corporations does not, ordinarily, differ from that which applies to individuals.[4]

In Pennsylvania and Illinois a different rule obtains. In those states debts of the counties, evidenced by warrants or orders, do not bear interest, unless there be a special agreement to that effect.[5]

Under the Missouri statute providing generally that creditors shall be allowed interest at the rate of six per cent. per annum, etc., it was held that county warrants draw interest after presentment to the treasury and refusal of payment by the treasurer, the court regarding the general statute as to in-

[1] La France Fire Engine Co. *v.* Davis, 9 Wash. 600, 38 Pac. R. 154.

[2] State *v.* Harvey, 12 Neb. 31; State *v.* Bd., etc., of Colfax Co., 10 Neb. 29. But, see, Eidemiller *v.* City of Tacoma, 14 Wash. 376, 44 Pac. R. 877.

[3] Diggs *v.* Lobsitz, 4 Okla. 232, 43 Pac. R. 1059.

[4] Langdon *v.* Town of Castleton, 30 Vt. 285; Commissioners *v.* Keller, 6 Kan. 510; Robbins *v.* Lincoln County Court, 3 Mo. 57.

[5] Allison *v.* Juniata Co., 50 Pa. St. 351; Madison Co. *v.* Bartlett, 2 Ill. 67.

terest as broad enough to embrace all debtors, counties as well as individuals.[1]

But under the rulings of the Illinois courts, as we have stated in a previous chapter, coupons for interest on their bonds do not bear interest until demand is made at the treasury of the municipality on the ground that it is not the duty of the municipality to seek its creditors.[2]

The holder of a warrant can not recover interest thereon after demand and non-payment for want of funds under the statute of Illinois. And the fact that the county board ordered a certain warrant issued with the interest clause can not be shown by parole evidence.[3]

But in Kansas the supreme court has held that such instruments are negotiable paper and are entitled to draw interest after dishonor.[4]

It has been held in Pennsylvania that where an ordinance provides for interest on warrants upon which payment has been refused on account of want of funds, the liability of the municipality is not affected by the repeal of the ordinance.[5]

The general doctrine is that if the holder retains the warrant after a refusal to pay under the rulings of the Pennsylvania court, he shows an intention to take the chance of funds coming into the treasury, and to accept what alone the treasurer can pay, and that is the face alone of the warrant or order. And where the holder sues upon the warrants or orders the same rule is adopted. The holder claims in court what the treasurer would have paid on the warrants or orders, that is the principal without interest.[6]

[1] Robbins *v.* Lincoln County Court, 3 Mo. 57; State *v.* Trustees, etc., Town of Pacific, 61 Mo. 155.

[2] City of Pekin *v.* Reynolds, 31 Ill. 529; City of Chicago *v.* People, 56 Ill. 327; People *v.* County of Tazewell, 22 Ill. 147; Johnson *v.* County of Stark, 24 Ill. 75.

[3] Hall *v.* Jackson Co., 95 Ill. 353. See, also, City of Scranton *v.* Hyde Park Gas Co., 102 Pa. St. 382; Camp *v.* Knox County, 3 Lea (Tenn.) 199; Board, etc., of Warren County *v.* Klein, 51 Miss. 807; Langdon *v.* Castleton, 30 Vt. 285.

[4] Commissioners *v.* Keller, 6 Kan. 510. See, also, State *v.* Pacific, 61 Mo. 155.

[5] City of Scranton *v.* Hyde Park Gas Co., 102 Pa. St. 382.

[6] Dyer *v.* Covington Tp., 19 Pa. St. 200; Allison *v.* Juniata Co., 50 Pa. St. 351.

In Iowa county orders or warrants draw interest from the time of presentment.[1]

In New York a city issued warrants or orders on its treasurer, payable when funds should be collected therefor from certain taxes, with interest. The funds being collected the common council ordered the treasurer to notify holders of warrants, by publication in the official paper, to present the same for payment, and that interest should cease after a certain date. It did not appear that the plaintiff knew of such publication, though duly made. It was held that the city was liable for interest on the warrants owned by the plaintiff down to the time of their presentation.[2]

So, it has been held that the holder of warrants issued after his claim for which they are issued has been audited is entitled to interest from the time the claim was audited.[3]

The legal rate of interest at the time, where there is nothing to the contrary, enters into the contract as a part thereof, and can not be affected by a subsequent law reducing the rate.[4]

§ 364. **Power to discount warrants.**—A municipality has no power to discount its warrants or its orders to its creditors without express legislative authority so as to make them equivalent to cash, nor to issue warrants or orders for more than the amount actually due the claimant. The courts have held that the warrants so issued, in excess of the amount, are void, and the holder will be treated only as the equitable assignee of the valid legal claim of the payee.[5]

The court held in Arkansas that a warrant was void for the excess beyond the amount actually due, in the hands of a *bona fide* purchaser for value. It was asserted that the act of the county court in auditing and adjusting this claim was binding

[1] Brown *v.* Board, etc., of Johnson Co., 1 Greene (Iowa) 486.

[2] Read *v.* City of Buffalo, 74 N. Y. 463.

[3] Smith *v.* City of Buffalo, 39 N. Y. Supp. 881.

[4] Union, etc., Trust Co. *v.* Gelbach, 36 Pac. R. 467.

[5] Shirk *v.* Pulaski Co., 4 Dillon 209; Goyne *v.* Ashley Co., 31 Ark. 552; Bauer *v.* Franklin Co., 51 Mo. 205; Foster *v.* Coleman, 10 Cal. 278; Clark *v.* City of Des Moines, 19 Iowa 199. See, also, Million *v.* Soule, 15 Wash. 261, 46 Pac. R. 234.

on the county, the county court having issued a warrant to a creditor for a larger amount than was actually due in order that from its market value the creditor, by its sale, might realize the amount that was due upon his account. But the court was of the opinion that such action did not have the force of a judicial judgment, and that the true rule upon the subject was that while in the absence of fraud or mistake, and within the scope of their powers, the action of the county court in such matters was binding, yet they could not bind the county by ordering a claim to be paid which was not a county charge, or by allowing more than the statute permits by discounting the warrants.[1]

The supreme court of the state of Washington, in a late case, has held that a city can not issue its warrant at a discount in payment of a debt, or for the purpose of borrowing money.[2]

Justice Anders, in delivering the opinion of the court in this case, said: "It is contended, however, on behalf of the respondents, that, inasmuch as the city had power to borrow money, it had the power to discount its warrants as a means of raising money, as a necessary implied power. But we are unable to agree with counsel in this view of the law. The power to borrow money was expressly conferred upon the city by its charter, but it was also provided that the amount borrowed, which was limited to a certain sum, should be evidenced by warrants drawing interest at a fixed rate per cent. And, therefore, nothing was left to implication. Everything pertaining to the power granted was clearly and unmistakably expressed by the legislature. It is also insisted that the city, by paying a portion of the discount on its warrants, in accordance with the agreement of its officers, ratified such agreement, and is now estopped from asserting the contrary. But we are constrained to take a different view of the law, and to hold that an illegal contract is incapable of being ratified; and the fact

[1] Shirk *v.* Pulaski Co., 4 Dillon 209; Goyne *v.* Ashley Co., 31 Ark. 552; Commissioners *v.* Keller, 6 Kan. 510. See, also, Board *v.* Heaston, 144 Ind. 583, and authorities there cited.

[2] Arnott *v.* City of Spokane, 6 Wash. 442, 33 Pac. R. 1063. Approved and followed in Million *v.* Soule, 15 Wash. 261, 46 Pac. R. 234, where it is also held that this can not be done indirectly by issuing warrants for more than the amount due.

that counsel for appellant, in the court below, admitted that the contract was thus ratified, can not avail the respondents here, for that question can only be determined by reference to the law. What the law will not sanction as a contract can not be made such by the admissions of a party or his counsel.'"[1]

§ 365. **Order of payment of warrants.**—Municipal warrants are to be paid in the order in which they are drawn or presented for payment in the absence of a statute providing a different mode of payment. But where the statute prescribes the mode in which warrants should be paid, that mode or manner must be strictly followed.[2]

The statute of Colorado provided that county warrants or orders not taken up at the date of presentation shall be entitled to preference as to payment, according to the order of time in which they may be presented to the county treasurer. The supreme court of Colorado, in construing this provision of the statute held that the county treasurer could not divert money, raised for the purpose of funding warrants, to pay warrants subsequently issued by the county commissioners, under the provisions of the act of the legislature of 1887, which provided that where there was no money to meet current expenses the board may draw warrants against taxes which have been levied, to the extent of eighty per cent., to meet current expenses.[3]

The constitution of California provides that no county shall incur any liability or indebtedness in any manner, or for any purpose, exceeding in any year its annual income, without

[1] Arnott *v.* City of Spokane, 6 Wash. 442, 33 Pac. R. 1063; Polk Co. Savings Bank *v.* State, 69 Iowa 24, 28 N. W. R. 416.

[2] La France Fire Engine Co. *v.* Davis, 9 Wash. 600, 38 Pac. R. 154; Bardsley *v.* Sternberg, 52 Pac. R. 251. See, also, Eidemiller *v.* City of Tacoma, 14 Wash. 376, 44 Pac. R. 877. In South Dakota they are payable in the order of their registration. State *v.* Campbell, 7 S. D. 568, 64 N. W. R. 1125; Shannon *v.* City of Huron, 69 N. W. R. 598. But the failure of the treasurer to register a warrant will not defeat the rights of the holder who has duly presented it for registration and payment. Freeman *v.* Huron, 73 N. W. R. 260.

[3] People *v.* Austin, 11 Colo. 134, 17 Pac. R. 485.

a two-thirds vote of the electors. The county government act provides that claims shall be paid, "according to the priority of time in which they were presented." In a proceeding for a writ of mandamus to compel the county treasurer to pay certain warrants, it was shown that the petitioner had a warrant issued on a valid claim that there was money enough in the fund on which it was drawn to pay it and all other warrants on claims accruing during that fiscal year. But the treasurer refused to pay the warrant, because there were not funds enough for them and outstanding warrants for former years previously presented. The court held that the income of each year must be used to pay the debt of that year, and that the county government act must apply primarily as between the warrants of any given year.[1]

A county warrant issued after the constitutional limit of indebtedness has been reached by the county, which is general in form, and does not purport to be payable from any particular fund or out of the revenues from the taxes of any specified year, is not a valid assignment within the meaning of article 11, section 6, of the constitution of the state of Colorado.[2]

It has been held in California that if the act which creates the office of county treasurer provides that warrants drawn on the treasury shall be paid in the order of their registration, such order of payment can not be changed by the county supervisors.[3]

Under the act of March, 1850, relating to county treasurers in California, a party who registers his warrants becomes a preferred creditor, and is entitled to be paid as soon as there are sufficient funds in the treasury and all prior warrants are satisfied.[4]

Under the constitution of California and the county government act, providing that each year's revenues must pay each year's indebtedness, the board of supervisors, after issuing a

[1] Shaw *v.* Statler, 74 Cal. 258, 15 Pac. R. 833. But see Eidemiller *v.* City of Tacoma, 14 Wash. 376, 44 Pac. R. 877.

[2] People *v.* May, 9 Colo. 404, 12 Pac. R. 838.

[3] Laforge *v.* Magee, 6 Cal. 285.

[4] Taylor *v.* Brooks, 5 Cal. 332.

warrant for payment of work completed within the fiscal year, can not exchange therefor another warrant issued in the next fiscal year, payable out of the revenues of that year.[1]

But where the board of supervisors, under the laws of California, issue a warrant which they are authorized to issue, the treasurer can exercise no discretion in regard to paying it.[2]

Under the laws of New Mexico, of 1893, the court fund is a particular fund of the county, out of which the assessor and collector are entitled to commissions for assessment and collection thereof, on the warrants of the county commissioners. The balance to be distributed on warrants of the district clerk, drawn by the order of the judge. It was held that a warrant of the commissioners against the fund, in favor of the assessor, should show that the indebtedness to him arose from performance of his duties as assessor in connection with the fund.[3]

§ 366. **As to the power to reissue warrants after payment.** —When municipal warrants are once paid by the proper municipal authorities they are *functus officio* and can not be put in circulation again so as to bind the municipality.

Thus, where certificates of indebtedness, city warrants, orders, checks, drafts and the like were drawn by the mayor of the city on the treasurer and were afterwards presented to the treasurer, who marked upon them the date of presentment, then paid to the collector, in discharge of the school tax, and by him paid over to the treasurer of the board of education, who sold them and applied the proceeds to school purposes, the supreme court of the United States said, "that it was conceded that they had been received by the collector in payment of taxes due the city. As evidences of indebtedness where this was done they were *functus officio*. They were paid and satisfied. They ceased to have any validity. They could not be reissued without the authority of the city council. Certainly the treasurer of the board of education had no authority thus to reissue them or sell them. Such an authority would render

[1] McGowan *v.* Ford, 107 Cal. 177, 40 Pac. R. 231.

[2] Von Schmidt *v.* Widber, 105 Cal. 151, 38 Pac. R. 682.

[3] Territory *v.* Browne, 7 N. Mex. 568, 37 Pac. R. 1116.

him controller and dispenser of the city credit. If he had authority to sell them for one price he had authority to sell them for another; and there was no limit to which he would thus have power to involve the city in debt."[1]

So, in New York, it has been held that county warrants or orders paid by the treasurer of the county cease to be valid, and can not again become valid securities even in the hands of innocent purchasers.[2]

In Massachusetts the town treasurer has no authority to take up notes for money loaned to the town by giving a new note therefor; and a vote of the town in the year in which the new note was given, but before its execution, authorizing him "to hire money for the use of the town, when necessary, upon the approval of the selectmen," would not confer such authority in itself.[3]

And where a town treasurer, of his own authority, took up notes for money loaned to a town, by giving a new note therefor, it was held that the transaction was not within the exception of the Massachusetts statute providing that "thereafter no debt shall be created by any town except for temporary loans payable out of the taxes for that or the next year, or debts incurred upon a two-thirds vote, or debts contracted for purposes for which towns may lawfully expend money," and, therefore, the note created no valid indebtedness against the town.[4]

§ 367. **Payment and cancellation of warrants.**—Payment by the treasurer or proper officer of a municipality of its warrants, or orders *ipso facto* extinguishes them. The transfer of a warrant made negotiable by statute divests the payee of any interest in it, and discharges the debtor from any obligation to the payee.[5]

[1] Mayor *v.* Ray, 19 Wall. 468. See, however, Bardsley *v.* Sternberg, 18 Wash. 612, 49 Pac. R. 499.

[2] Chemung Canal Bank *v.* Supervisors, etc., 5 Denio 517; District of Columbia *v.* Cornell, 130 U. S. 655. See, also, Sweet *v.* Co. Comrs. of Carver Co., 16 Minn. 106.

[3] Abbott *v.* Inhabitants of North Andover, 145 Mass. 484, 14 N. E. R. 754.

[4] Abbott *v.* Inhabitants of North Andover, 145 Mass. 484.

[5] Sweet *v.* Co. Comrs. of Carver, 16 Minn. 106; Crawford Co. *v.* Wilson, 7 Ark. 214.

It has been held in California that a treasurer can not be compelled to pay to any other than the original payee, although the warrant or order is made payable to bearer, without an assignment by the payee.[1]

It has been held in Maine that the receiving of a town order by the collector in payment of taxes is not in itself a payment of the order. There must be some further act to show an intention to extinguish.[2]

Where a town order is presented by the payee to the treasurer of the town and paid, it ceases to be a valid contract and can not be again negotiated in payment of other debts owing by the town.[3]

The supreme court of the United States has held that the cancellation of warrants originally issued and the substitution of others in their place does not change their character. Neither that proceeding nor the original auditing of the claims for which they were issued has the force of a judicial determination.[4]

The notice required to be given of the order of the county court calling in warrants for cancellation and reissue, under a statute in Arkansas, is for the benefit of the warrant holders, and the county, which is suitor in the proceedings, can not object that legal notice of such call was not given.[5]

§ 368. **Liability of treasurer for failure to cancel warrants when paid.**—Where a county treasurer who, by law, was forbidden to buy or sell, or in any manner deal in county warrants, upon payment of a county warrant neglects to cancel it, but marks it "not paid for want of funds," and puts it into circulation, the subsequent holder, though he purchased it for value and in good faith, can not maintain an action against the sureties on the official bond of the treasurer for alleged malfeasance in office.[6]

[1] People *v.* Gray, 23 Cal. 125.

[2] Wiley *v.* Greenfield, 30 Me. 452.

[3] Mitchell *v.* Inhabitants of Albion, 81 Me. 482, 17 Atlantic R. 546.

[4] Wall *v.* County of Monroe, 103 U. S. 74.

[5] Cissell *v.* Pulaski Co., 10 Fed. R. 891.

[6] McConnell *v.* Simpson, 36 Fed. R. 750. See, also, Chandler *v.* Bay St. Louis, 57 Miss. 327.

§ 369. **Validity of warrants issued on unverified accounts.**— Whether the accounts for which county warrants sued on were issued were sufficiently itemized, as required by the statute of Kansas of 1889, which authorizes the issuance of warrants by county commissioners, can not be determined by a reviewing court, where the cause was tried without a jury but the accounts or vouchers were not incorporated in the special findings, and the only finding in regard thereto was that the various vouchers were "itemized," "duly itemized," and, in some cases, "not very definitely itemized."

Hence a county warrant issued by a board of county commissioners for an account which was not verified, though verification is required by the statute, is not utterly void; and a recovery may be had thereon unless it is shown to have been issued fraudulently or without consideration, or for an indebtedness which the board was not authorized to contract.[1]

§ 370. **Validity of warrants issued for special services.**— County warrants issued to persons hired by the county clerk to make out the tax-roll of the county and for extra clerk hire are void, under the provisions of the Kansas statute, which provides that the salary allowed the clerk shall be, "in full of all services whatsoever by law required to be performed in his office."[2]

But a county warrant issued to one of the county commissioners for special services rendered under the provisions of the Kansas statute "in certain county seat contest cases" is not rendered invalid by the mere fact that the services are found to have been rendered outside the county, nor can the court say that the county can in no event have such an interest in a county seat contest that the commissioners would not have authority to incur expenses in connection therewith.[3]

§ 371. **The rights of parties who lose a warrant or order.**— A warrant or order for an indebtedness not being a payment, its loss, even though the warrant or order is indorsed in blank,

[1] Board of Commissioners *v.* Sherwood, 64 Fed. R. 103, 11 C. C. A. 507.

[2] Board of Commissioners *v.* Sherwood, 64 Fed. R. 103, 11 C. C. A. 507.

[3] Board of Commissioners *v.* Sherwood, 64 Fed. R. 103, 11 C. C. A. 507.

can not affect the right of the payee to payment of his debt. In such case it is proper to issue to him a duplicate order, on the payment and surrender of which the original order will become inoperative and void.

And when there has been no actual transfer of a county order before the proper county officers are notified of its loss, the original creditor will be entitled to payment notwithstanding such loss, and the holder of the lost order, though an innocent purchaser for its full market value, will be without remedy against the county, whether the order was transferred by written assignment or by delivery only.[1]

A municipality may legally issue new warrants or orders to take the place of warrants lost or destroyed by fire after they are issued.[2]

But it has been held that the issue of a duplicate warrant in the place of one at the time believed to be lost, but which was subsequently found, is not an admission or recognition of the validity of the original warrant.[3]

[1] People *v.* Johnson, 100 Ill. 537.
[2] Craig *v.* Chicot Co., 40 Ark. 233.
[3] Royster *v.* Board, etc., of Granville Co., 98 N. Car. 148.

CHAPTER XVIII.

CONSTRUCTION OF MUNICIPAL SECURITIES

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§ 372. **General rules of construction.**—The following general rules governing the construction of municipal securities

may be considered as settled by the supreme court of the United States:

First. There must be an original authority conferred by statute upon a municipality before it is authorized to issue negotiable municipal bonds. Municipal corporations have not the power, except through the special authority of the legislature, either express or clearly implied, to issue corporate bonds which will bind a municipality.[1]

Second. If there be a lawful authority for the municipality to issue negotiable bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, can not be urged against a *bona fide* holder seeking to enforce them.[2]

Third. If an election or other fact is required to authorize the issue of such bonds of a municipality, and if the result of that election, or the existence of that fact, is by law to be ascertained and declared by any judge, officer, or tribunal, and that judge, officer or tribunal, on behalf of the municipality, executes or issues the bonds, with a recital that the election has been held, or that the facts exist, or have taken place, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds.[3]

Fourth. Where a party deals with a corporation in good faith, and is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, the corporation is bound by the contract, if not *ultra vires*, although

[1] Marsh *v.* Fulton Co., 10 Wall. 676; Kenicott *v.* Supervisors of Lane Co., 83 U. S. 452; *ante*, chap. vi.

[2] Kenicott *v.* The Supervisors, 16 Wall. (U. S.) 452; Grand Chute *v.* Windear, 15 U. S. 355; Board, etc., of Knox Co *v.* Aspinwall, 21 How. 539; Gelpcke *v* City of Dubuque, 1 Wall. 203; Moran *v.* Comrs. of Miami Co., 2 Black 722.

[3] Kenicott *v.* Supervisors of Wayne Co., 16 Wall. (U. S.) 452; Town of Coloma *v.* Eaves, 92 U. S. 484; Town of Venice *v.* Murdock, 92 U. S. 496; Town of Genoa *v.* Woodruff, 92 U. S. 502; County of Moultrie *v.* Savings Bank, 92 U. S. 631; Marcy *v.* Township of Oswego, 92 U. S. 637; Walnut *v.* Wade, 103 U. S. 683; Commissioners *v.* Bolles, 94 U. S. 104; Buchanan *v.* Lichfield, 102 U. S. 278; Bonham *v.* Needles, 103 U. S. 648; Orleans *v.* Platt, 99 U. S. 676; Lincoln *v.* Iron Co., 103 U. S. 412; Moultrie Co. *v.* Fairfield, Morrison's transcript, vol. 4, No. 1, p. 152; Commisssoners *v.* January, 94 U. S. 202; St. Joseph Tp. *v.* Rogers, 16 Wall. 644.

such defect or irregularity in fact exists. And if the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence and the corporation is estopped to deny them.[1]

Fifth. When a corporation has power, under any circumstances to issue negotiable securities, the *bona fide* holder usually has a right to presume that they were issued under the circumstances which give the requisite authority and they are no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper.[2]

Sixth. Where negotiable bonds or securities on their face import by recitals a compliance with the law under which they were issued, the purchaser is not, ordinarily, bound to look farther for evidences of compliance with the conditions annexed to the power to issue them.[3]

Seventh. Municipal officers can not rightly dispense with any of the essential forms of proceedings which the legislature has prescribed for the purpose of investing them with the power to issue bonds. And if they do, the bonds they issue will be invalid in the hands of all that can not claim protection as *bona fide* holders.[4]

Eighth. The power to issue municipal securities must exist before any protection as an innocent purchaser can be claimed by the holder. The protection which commercial usage throws around negotiable paper can not be used to establish the authority by which it was originally issued. A ratification can only be made when the party ratifying possesses the power to perform the act ratified.[5]

Ninth. A purchaser of municipal bonds is bound to take notice of the constitutional limitation upon the power to incur municipal indebtedness and of the official assessments showing the valuation of taxable property within the municipality. But when, upon the face of the bonds, there is an express re-

[1] Merchants' Bank *v.* State Bank, 10 Wall. 604.

[2] Gelpcke *v.* City of Dubuque, 1 Wall. 175.

[3] Board, etc., Knox Co. *v.* Aspinwall, 21 How. 539; Mercer Co. *v.* Hackett, 1 Wall. 83.

[4] McClure *v.* Township of Oxford, 94 U. S. 429.

[5] Marsh *v.* Fulton Co., 10 Wall. 676; Wells *v.* Supervisors, 102 U. S. 625.

cital by officers charged with determining the matter that the limitation has not been passed, and the bonds themselves do not show that it has, he is not, as a rule, bound to look further, at least in the case of a mere statutory limitation.[1] Where the limitation is in the constitution, however, it seems that the municipality is not estopped by such recitals, especially if the matter can be determined from the public record and is not left to the determination of the officers making the recitals.[2]

Tenth. Purchasers of municipal bonds are charged with notice of the laws of the state granting power to make the bonds they find in the market. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of its execution, and the municipality may be estopped by recitals; but if there is a want of power, no legal liability can be created.[3]

§ 373. **Policy of the federal courts as to the enforcement of payment of municipal securities.**—In proceedings for the enforcement of the payment of municipal bonds, the policy of the federal courts is to sustain, if possible, the validity of the bonds, and they will refuse to invalidate the same except for grave and serious infirmities. Even when the question which arises is a doubtful one, a construction should be given to the statute which upholds the bonds rather than one which turns them to ashes in the hands of a *bona fide* holder.[4]

§ 374. **When federal courts will follow the construction of state courts.**—The federal courts, in passing upon the validity of state or county bonds, will follow the construction of state laws announced by the state courts at the time the bonds were issued, upon reliance on which they found a market, rather

[1] Chaffee Co. *v.* Potter, 142 U. S. 355; Doon Tp. *v.* Cummins, 142 U. S. 366; Nesbit *v.* Riverside Independent District, 144 U. S. 610; Buchanan *v.* Litchfield, 102 U. S. 278.

[2] Hedges *v.* Dixon County, 150 U. S. 182; Sutliff *v.* Lake Co. Com'rs., 147 U. S. 230.

[3] Northern Bank, etc., *v.* Porter Tp. Trustees, 110 U. S. 608.

[4] Rich *v.* Town of Mentz, 18 Fed. R. 52, 134 U. S. 632; Whiting *v.* Town of Potter, 18 Blatch. 165, 2 Fed. R. 517; Town of Aroma *v.* Auditor of State, 15 Fed. R. 843.

than a contrary construction, announced after such bonds are in circulation as commercial securities.[1]

When the only question in a suit on coupons of certain bonds is the existence of the authority to issue them under the state statute and constitution, a prior decision thereof by the state supreme court, in a suit by a tax-payer to recover taxes levied to recover interest on bonds, is binding on the federal courts.[2]

A decision of the state supreme court sustaining the statute which validates certain municipal bonds is not controlling on a federal court, however, when it appears that the bonds were void for failure to comply with the provisions of the state constitution, and that this point was not called to the attention of the state court, and its decision was based on other grounds.[3]

§ 375. **When the supreme court of the United States follows the decision of the state courts.**—There seems to be a conflict of opinion between some of the state courts and the supreme court of the United States upon the subject of municipal securities and the rights of *bona fide* holders. It is, therefore, of great importance to holders of municipal securities to know what decisions control in the construction of such securities and when the supreme court of the United States will follow the decisions of the state courts. The judiciary act of 1789, organizing the courts of the United States, provides that, "the laws of the several states except where the constitution, treaties or statutes of the United States otherwise requires or provides, shall be regarded as rules of decisions in trials at common law in the courts of the United States, in cases where they apply."[4]

[1] In re Copenhaver, 54 Fed. R. 660; State *v.* Co. Ct. of Sullivan, 51 Mo. 522; State *v.* Greene Co., 54 Mo. 540; County of Scotland *v.* Thomas, 94 U. S. 682; Flagg *v.* City of Palmyra, 33 Mo. 440; Smith *v.* County of Clark, 54 Mo. 58; Gelpcke *v.* City of Dubuque, 1 Wall. 175; Anderson *v.* Santa Anna, 116 U. S. 356, 6 Sup. Ct. R. 413; Douglas *v.* County of Pike, 101 U. S. 677; Green Co. *v.* Conness, 109 U. S. 105.

[2] Folson *v.* Township, 59 Fed. R. 67; Cross *v.* Allen, 141 U. S. 528; Norton *v.* Shelby Co. 118 U. S. 425.

[3] Quaker City National Bank *v.* Nolan Co., 59 Fed. R. 660; Ashuelot National Bank *v.* School District, 56 Fed. R. 197; Brenham *v.* German-American Bank, 144 U. S. 173.

[4] Rev. Stat. U. S., p. 137, Chap. 12, § 721.

The supreme court of the United States has held that the construction given to the statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and as binding as is the text upon the courts of the United States.[1]

§ 376. **The general doctrine qualified.**—If the highest judicial tribunal of a state adopts new views as to the proper construction of such a statute, and reverses its former decisions, the supreme court of the United States will follow the latest settled adjudications, unless rights were acquired upon the faith of earlier decisions.[2]

It is a general principle of the jurisprudence of the supreme court of the United States that to the highest courts of the state belong the right to construe its statutes and its constitution, except where they may conflict with the constitution of the United States, or some statute, or a treaty made under it. Nor is it denied that when such a construction has been given by the state courts, the supreme court is bound to follow it. The cases on this subject are numerous, and the principle is as well settled, and is as necessary to the harmonious working of our complex system of government as the correlative proposition that to the supreme court of the United States belongs the right to expound conclusively, for all other courts, the constitution and laws of the federal government.[3]

[1] Leffingwell *v.* Warren, 2 Black (U. S.) 599; Shelby *v.* Guy, 11 Wheat. 361; McCluny *v.* Silliman, 3 Pet. 270; Green *v.* Neal, 6 Pet. 291; Rose *v.* Duval, 13 Pet. 45; Massingill *v.* Downs, 7 How. 760; Nesmith *v.* Sheldon, 7 How. 812; Van Rensselaer *v.* Kearney, 11 How. 297; Webster *v.* Cooper, 14 How. 488.

[2] Leffingwell *v.* Warren, 2 Black (U. S.) 599; United States *v.* Morrison, 4 Pet. 124; Bauserman *v.* Blunt, 147 U. S 647; Green *v.* Neal, 6 Pet. 291; Western, etc., Co. *v.* Poe, 64 Fed. R. 9; Marbury *v.* Kentucky, etc., Co., 62 Fed. R. 335.

[3] Gelpecke *v.* Dubuque, 1 Wall. 175; Burgess *v.* Seligman, 107 U. S. 20; United States *v.* Morrison, 4 Pet. 124; Sutherland-Innes Co. *v.* Village of Evart, 86 Fed. R. 597; Chicago, etc., R. Co. *v.* Stahley, 62 Fed. R. 363; Green *v.* Neal, 6 Pet. 291; Louisville, etc., Co. *v.* City of Cincinnati, 76 Fed. R. 296; Township of Elmwood *v.* Marcy, 92 U. S. 289; Forsythe *v.* Hammond, 166 U. S. 506, 17 Sup. Ct. R. 665; Merchants', etc., Bank *v.* Commonwealth of Pennsylvania, 167 U. S. 461, 17 Sup. Ct. R. 829

In a case involving this question, in the supreme court of the United States, Mr. Justice McLean said: "The inquiry is, What is the settled law of the state at the time the decision is made? This constitutes the rule of property within the state by which the rights of litigant parties must be determined. As the federal tribunals profess to be governed by this rule they can never act inconsistently by enforcing it. If they change their decision it is because the rule on which it has been founded has been changed."[1]

The courts of a state having, when bonds were issued, construed its constitution and laws so as to give them force and vitality, can not, by a subsequent and contrary construction, destroy them.[2]

§ 377. **Illustrations of this subject.**—The leading case on this subject is Gelpcke *v.* Dubuque.[3] In this case the rule is laid down by the supreme court of the United States that it will follow the latest settled decision of the state court in the construction of its statute and constitution involving the validity of municipal securities, but that bonds which were valid under the settled law of the state at the time they were issued can not be invalidated by a change in the views of the state court.

In this case the action was brought upon bonds issued by the city of Dubuque, July 1, 1857, in aid of a certain railway, pursuant to an act of the legislature authorizing the city of Dubuque to issue bonds and borrow money to aid in building a railroad running beyond its limit, and to impose taxes upon its inhabitants to pay the bonds and accruing interest. The constitutionality of such legislation was upheld by the supreme court of Iowa in a series of decisions. The earliest of these decisions was in 1853, the latest in 1859. The bonds in question, as before stated, were issued and put upon the market between the periods named, to wit: On July 1, 1857. In

[1] Green *v.* Neal, 6 Pet. 291.

[2] Thomson *v.* Lee Co., 3 Wall. 327; Douglas *v.* County of Pike, 101 U. S. 677; Township of Elmwood *v.* Marcy, 92 U.S. 289; Stallcup *v.* City of Tacoma, 13 Wash. 141, 42 Pac. R. 541; Harshman *v.* Knox County, 122 U. S. 306, 7 Sup. Ct. R. 1171.

[3] Gelpcke *v.* Dubuque, 1 Wall. 175.

1863, in the case of the State *v.* The County of Wapello,[1] the supreme court of Iowa decided that there was no power in the legislature to delegate such power to municipalities, that such an act would be in violation of the constitution of the state, and, therefore, overruled its former decisions.

It was, therefore, insisted that in cases involving the construction of the state law or constitution, the supreme court of the United States was bound to follow the latest adjudication of the highest court of the state. The supreme court of the United States refused to follow the latest adjudication of the supreme court of Iowa in construing these bonds for the reason that if the bonds, when issued, were valid by the laws of the state as then expounded and administered in its courts of justice, their validity and obligation can not be impaired by any subsequent legislation or decision of its courts. The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. Mr. Justice Swayne, speaking for the court, said: "We are not unmindful of the importance of uniformity of decisions of this court, and those of the highest local courts, giving construction to the laws and constitutions of their own states. It is the settled rule of this court in such cases, to follow the decisions of the state courts. But there have been, heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice and the law, because a state tribunal has erected the altar and decreed the sacrifice."[2]

In a later case in the supreme court of the United States, involving this same question, Mr. Justice Davis said: "We are not called upon to vindicate the decisions of the supreme court of Illinois in these cases or approve the reasoning by which it reached a conclusion. And if the question before us had never been passed upon by it some of my brethren, who agree to this opinion, might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void, because

[1] State *v.* The County of Wapello, 13 Iowa 390.

[2] Gelpcke *v.* Dubuque, 1 Wall. 175.

the laws which authorize their issue were in violation of a peculiar provision of the constitution of Illinois. We have always followed the highest court of the state in the construction of its own constitution and laws. It is only where they have been construed differently at different times that, in cases like this, we have adopted as a rule of action the first decision and rejected the last. This has been done on the ground that rights acquired on the strength of former decisions ought not to be lost by a change of opinion in the court. But where the construction has been fixed by an unbroken series of decisions, the federal courts accept and apply it in cases before them. If a different rule were observed, it is not difficult to see that great mischief would ensue.'"[1]

In a still more recent case, Mr. Justice Woods, in considering and discussing this subject, said: "It is insisted that this court is bound to follow this decision of the supreme court of Illinois, and to hold the bonds in question void. We do not so understand our duty. Where the construction of a state constitution or law has become settled by the decision of the state courts, the courts of the United States will, as a general rule, accept it as evidence of what the local law is. Thus, we may be required to yield against our own judgment to the proposition that, under the charter of the railway company, the election in this case, which was held under the supervision of a moderator chosen by the electors present, was irregular, and therefore void. But we are not bound to accept the inference drawn by the supreme court of Illinois that, in consequence of such irregularity in the election, the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of *bona fide* holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusion of any other court, however learned or able it may be.'"[2]

[1] Elmwood *v.* Marcy, 92 U. S. 289. [2] Pana *v.* Bowler, 107 U. S. 529;

§ 378. **The true rule stated.**—Hence, the true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. The rights of the parties in regard to municipal bonds are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.[1]

In other words, the supreme court of the United States treats the construction which the highest court of the state has given to a statute of the state as part of the statute. But where different constructions have been given to the same statute at different times, it will not follow the latest decisions, if thereby contract rights which have accrued under earlier rulings would be injuriously affected thereby.

§ 379. **Rule as to the construction of statutes.**—Where contracts are made under a settled construction of the constitution by the judiciary, and vested rights are thus acquired, they can not afterwards be invalidated by a change in such construction or by any change in the constitution itself.[2]

But in the interpretation or construction of statutes, ascertainment of the intention of the legislature is the end or purpose to be accomplished. Where a law is plain and certain in its terms, and free from ambiguity, a reading suffices, and no interpretation is needed, or proper. Thus statutes which authorize the issuance of bonds by the minor political subdivisions of the state are subjects for strict construction when an interpretation is necessary, and where, from a careful study

Township of Pine Grove *v.* Talcott, 19 Wall. 666.

[1] Green Co. *v.* Conness, 109 U.S. 104; Douglass *v.* County of Pike, 101 U. S. 677; County of Ralls *v.* Douglass, 105 U. S. 728; New Buffalo *v.* Cambria Iron Co., 105 U. S. 73; Mitchell *v.* Burlington, 4 Wall. 270.

[2] Douglass *v.* County of Pike, 101 U. S. 677; Gelpcke *v.* Dubuque, 1 Wall. 175; Olcott *v.* Supervisors, 16 Wall. 678; White *v.* Hart, 13 Wall. 646; Railroad Co. *v.* Gaines, 97 U. S. 697; Louisiana *v.* Mayor of New Orleans, 109 U. S. 285; Carney *v.* Village of Marseilles, 136 Ill. 401, 26 N. E. R. 491; Stallcup *v.* City of Tacoma, 13 Wash. 141, 42 Pac. R. 541.

and analysis of the whole part, the meaning and intent is doubtful, the doubt should be resolved in favor of the public or tax-payers.[1]

§ 380. **Mere irregularity in the issuance of bonds will not invalidate them.**—It is the settled doctrine of the Nebraska courts that every reasonable opportunity is offered to tax-payers to protect their rights by enjoining the issue or registration of illegal bonds, and unless there is a want of power to issue the same, bonds duly issued and registered will not be declared invalid for mere irregularity in the exercise of the power to issue such bonds.[2] Subject, perhaps, to some qualifications or exceptions, this may be taken as the general rule, for, as already shown, there is a well-marked distinction between a mere irregularity and a total want of power.

§ 381. **Proposition to issue bonds made by railways constitutes a contract.**—A proposition to issue bonds to a railway company is in the nature of a contract, upon the acceptance of which both parties are bound by the agreement. Thus, where certain petitioners were induced to sign a petition calling an election in a certain township upon the representation of an agent of the railway company that the depot would be located on section 16 of said township, when, in fact, the depot was afterwards located on section 17, it was held that the company was bound by the representations of its agents, and that persons who had been deceived thereby and induced to sign the petition might set up such facts to enjoin the issuing of the bonds.[3]

[1] State, *ex rel.*, School District *v.* Moore, 45 Neb. 12.

[2] Cook *v.* City of Beatrice, 32 Neb. 80; Freemont Building Association *v.* Sherwin, 6 Neb. 48; United States *v.* Dodge Co. Comrs., 110 U. S. 156.

[3] Wullenwaber *v.* Dunigan, 30 Neb. 877; Curry *v.* Board of Supervisors, 61 Iowa 71, 15 N. W. R. 602; Sinnett *v.* Moles, 38 Iowa 25; Henderson *v.* San Antonio Railroad Co., 17 Tex. 560, 67 Am. Dec. 675; Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116; Wickham *v.* Grant, 28 Kan. 517; Melendy *v.* Keen, 89 Ill. 395; Sanford *v.* Handy, 23 Wend. 260; Burhop *v.* City of Milwaukee, 18 Wis. 431; McClellan *v.* Scott, 24 Wis. 81; Davis & Co. *v.* Dumont, 37 Iowa 47; Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 188. Of course a mere proposition unaccepted and not acted upon is not, in itself, a complete contract.

§ 382. **Proposition to vote bonds in aid of internal improvements must designate the donee.**—In Nebraska a proposition submitted to the voters of a county in which it is proposed to vote the bonds of such county to a railroad company must designate the donee. A proposition in the alternative, to issue them to a certain corporation named or to another designated corporation, is ineffectual to authorize the issuing of bonds, even if adopted by the legal voters. It was further decided that bonds issued by a county as a donation to a railroad company are invalid unless they have indorsed thereon a certificate, signed by the secretary and auditor of the state, showing that they were issued pursuant to law.[1]

§ 383. **Validity of bonds issued for the building of bridges between adjoining counties.**—The court will not control the discretion of the county board as to what bridges they shall erect or repair, unless there is a clear abuse of the trust, even where there are not sufficient funds available to erect or repair all necessary bridges. So long as such board act within the scope of their authority, an injunction will not lie to restrain them. Where the middle of the stream is the dividing line between two counties and a bridge is erected across said stream by the county board of one of such counties without the co-operation of the other, the county erecting the bridge may use precinct bonds, voted for that purpose, to complete the bridge in the county not co-operating in the erection of the bridge.[2]

§ 384. **Power to issue bonds for a lower rate than expressed in the statute.**—The general rule is that all contracts made by municipal officers in excess of their powers are invalid, and this rule applies to municipal bonds. In an action upon certain municipal bonds, it appeared that the proper city authorities submitted to the voters of said city a proposition for the issue

[1] State *v.* Roggen, 22 Neb. 118; State *v.* Babcock, 19 Neb. 223; Jones *v.* Hurlburt, 13 Neb. 125; Spurck *v.* L. & N. W. R. R. Co., 14 Neb. 293.

[2] Brown *v.* Merrick Co., 18 Neb. 355; Com. of Highways *v.* Comrs. of Highways, 100 Ill. 631; State *v.* Comrs. Kearney Co., 12 Neb. 6; Railroad Co. *v.* County of Otoe, 16 Wall. 667; Walker *v.* City of Cincinnati, 21 Ohio St. 14; Sharpless *v.* Mayor, 21 Pa. St. 147; Goddin *v.* Crump, 8 Leigh (Va.) 120.

of a hundred thousand dollars in bonds for the paving of the streets of said city, the bonds to run twenty years, to be sold at not less than par, and to draw interest at six per cent., payable semi-annually in the city of New York. The proposition was adopted, and the mayor and council, having ascertained that bonds at a less rate of interest than six per cent. could be sold at their face value, issued said bonds with interest at five per cent., but conforming in all other respects to the proposition as adopted by the electors. These bonds were sold to the plaintiff for the sum of $102,041.67. Afterwards, a question having arisen as to the validity of the bonds, by reason of the less rate of interest in the bond than in the proposition, the plaintiff sought to rescind the contract and recover the money paid. The demurrer was sustained to the petition of the plaintiff by the court below. It was held by the supreme court of Nebraska that the rate of interest being within the authority conferred, the bonds were valid. The reasoning of the court was based upon the fundamental principle of the law of agency, that it is the duty of the agent to protect and advance the interest of his principal.[1]

§ 385. **Irregularity in the organization of a municipality no defense to bonds.**—Irregularities in the organization of a school district are no defense to an application for a writ of mandamus to compel the payment of its bonds.[2]

Thus, an election was held for the purpose of voting school district bonds to raise money to build a school-house. Nineteen voters, being all of the male inhabitants of the district over the age of twenty-one years, attended said election and voted, except seven, some of whom were absent in other states and some in a distant part of the state, all of whom had been absent for a period of four months, and none of whom were expected to return within less than a month after said election, and one who knew of said election, but did not attend for the reason that he was about to remove from said district. In an application for a writ of mandamus, to compel the payment

[1] Omaha National Bank *v.* City of Omaha, 15 Neb. 333.

[2] State *v.* School District, 13 Neb. 78.

of bonds voted at said election, it was held that the court would not inquire into the alleged want of a request, signed by at least five electors, for the calling of such election, or whether the notice therefor was published for the length of time required by the statute.[1]

§ 386. **Bonded debt attaches, when to realty.**—The liability for a debt attaches to the real estate of the municipality as soon as the bonds are legally authorized and issued, and the fact that the proceeds of the bonds have not been expended when the change of boundary lines is made will not exempt the detached territory from bearing its proportionate share of the debt.[2]

§ 387. **Sale of railroad does not release the municipality from subscription.**—The sale or consolidation of a railroad company which a municipality has aided by subscribing to its stock or issuing bonds, will not necessarily relieve the municipality from liability. Thus, a proposition was submitted to the qualified electors of a county to subscribe for stock of a railroad and issue the bonds of the county therefor upon the condition, among others, that the railroad should be completed and in operation in the county, by lease or otherwise from a connection with existing lines of railroad in the state having direct and continuous lines of connection to the Missouri river, and also conditioned that the acceptance of the bonds issued in payment of the stock should be held and taken as a covenant binding upon the railroad company, its lessees or assigns,

[1] State *v.* School District, 13 Neb. 466; People *v.* Trustees, etc., of Newberry, 87 Ill. 41; Trumbo *v.* The People, 75 Ill. 561; School District *v.* Cowee, 9 Neb. 53; Dean *v.* Gleason, 16 Wis. 18; Ellis *v.* Carroll, 7 Neb. 381; Fisher *v.* Inhabitants of School District, 4 Cush. 494; Mills *v.* Gleason, 11 Wis. 470; Bank *v.* Chillicothe, 7 Ohio 354.

[2] State *v.* Commissioners of Kiowa Co., 41 Kan. 630; State *v.* Commissioners of Kiowa Co., 39 Kan. 657; Weyard *v.* Stover, 35 Kan. 545; Comrs. of Sedgwick Co. *v.* Bunker, 16 Kan. 498; Comrs. of Ottowa Co. *v.* Nelson, 19 Kan. 234; Chandler *v.* Reynolds, 19 Kan. 249; Comrs. of Marion Co. *v.* Harvey Co., 26 Kan. 181; Craft *v.* Lofinck, 34 Kan. 365; Riley *v.* Township of Garfield, 54 Kan. 463, 38 Pac. R. 560. See, also, Bradish *v.* Lucken, 38 Minn. 186, 36 N. W. R. 454.

to maintain and operate said line of road, by lease or otherwise, over its route for the term of ninety-nine years. In a suit upon the bonds, it was held that an agreement by the railroad company, executed after the subscription of the county, to sell and transfer its road after it was completed, in order to obtain money for its construction, did not discharge or release the county from the payment of its subscription.[1]

§ 388. **Measure of damages for the conversion of municipal bonds.**—The measure of damages for the conversion of municipal bonds is, *prima facie*, their face value, if no market value is shown. When the market value is shown, that is to be deemed the measure of damages in any action for conversion. Market value signifies a price established by public sale or sales in the way of ordinary business. Proof of two anomalous sales of municipal bonds does not establish the market value of the bonds.[2]

§ 389. **Levy of taxes on detached territory, for what portion liable.**—In an action involving certain bridge bonds, it appeared that an election was held in a township, under the provisions of a statute on April 21, 1870, to obtain the consent of the voters to issue bonds for the purpose of building a bridge. The notice of the election and the ballots used for that purpose showed the proposition to be, whether the township should issue bonds in an amount not to exceed ten per cent. of the valuation of the township. The taxable property of the township was $130,000, as shown by the assessment of 1869, and $203,000 by the assessment of 1870, which was in progress at the time of the election, but not completed under the law until in July, 1870, and after the issuance of the bonds

[1] Southern Kansas and P. R. R. Co. *v.* Towner, 41 Kan. 72; Manning *v.* Mathews, 66 Iowa 665; Blunt *v.* Carpenter, 68 Iowa 265. See Merrill *v.* Marshall County, 74 Iowa 24, 36 N.W. R. 778; Cantillon *v.* Dubuque, etc., R. Co., 78 Iowa 48, 35 N. W. R. 620; Nelson *v.* Haywood County, 87 Tenn. 781.

[2] Meixwell *v.* Kirkpatrick, 33 Kan. 282; Meixwell *v.* Kirkpatrick, 28 Kan. 315; Meixwell *v.* Kirkpatrick, 29 Kan. 679; Murray *v.* Stanton, 99 Mass. 345; Shoemaker *v.* Simpson, 16 Kan. 43; Hall *v.* Draper, 20 Kan. 137; Smith *v.* Schulenberg, 34 Wis. 41. See Griffith *v.* Burden, 35 Iowa 138.

voted for. It was held that the valuation shown by the assessment roll of 1869 controlled, and the issue of bonds authorized by the vote of the electors was limited to $13,000.

Hence, where the statute provided that only the bonds legally authorized and issued by a vote of the electors of a township are a lien on the territory detached from the township, after the bonds are authorized and issued; and where there is an excessive or overissue of bonds before the division of the township, the detached territory is not liable for any portion of the bonds issued in excess of the authority conferred on the township officials by the vote of the electors.[1]

Where a township in any county issues bonds for the construction of a bridge, and before the bonds are paid a portion of the territory of such township is detached from the township, and out of such detached territory, together with other territory, a new township is organized, it has been held that it is the duty of the officers of the old township to levy all the taxes that are to be levied for the payment of said bonds and interest, whether such taxes are to be levied on the property of the old township or on the real estate of the detached territory; and it is not the duty of the officers of the new township to levy any of said taxes.[2]

§ 390. **Municipal indebtedness not discharged by mere levy of taxes.**—The mere levying and collecting a tax with which to pay certain municipal indebtedness does not relieve the municipality from paying such indebtedness.[3]

§ 391. **When a municipal officer is estopped from questioning the levy and collection of taxes received by him.**—Where municipal taxes are levied and collected for the payment of registered municipal bonds, and paid over to the supervisor of the municipality, and he delivers the money to the treasurer, who fails to apply the same in payment of such bonds, the supervisors and the sureties on his bond will be liable to the municipality for such money. And after the levy and collec-

[1] Hurt *v.* Hamilton, 25 Kan. 76.

[2] Fender *v.* Neosho Falls Township, 22 Kan. 305.

[3] Comrs. of Leavenworth Co. *v.* Higginbotham, 17 Kan. 62.

tion of taxes by the municipal authorities for the purpose of paying municipal liabilities, and receipt by the supervisor as such, he and his sureties will be estopped from calling in question the regularity of the steps taken by the municipal authorities to levy and collect the money.[1]

So, where the treasurer of a municipal corporation pays an illegal warrant, knowing it to be illegal, out of money set apart for the payment of the warrant substituted for it, whereby the fund out of which the latter is payable is exhausted, this is a misappropriation of funds for which the sureties on his official bond will be liable.[2]

§ 392. **As to the validity of bonds when part of the condition is void.**—Where a municipal bond contains two conditions, one authorized by law and good, and the other unauthorized and bad, and the conditions are in their nature severable, the latter may be rejected and the other held good and the bond sustained.[3]

§ 393. **Power to waive appraisement laws in municipal bonds.**—A promise to pay contained in municipal bonds "without relief from the valuation or appraisement laws of the state," is a mere waiver by the debtor of the benefit of the valuation or appraisement in case the obligation shall be enforced by execution at law, and can not be construed to require levies for the payment of the bonds to be made upon the same valuation that existed in the municipality when the bonds were issued.[4]

§ 394. **Validity of bonds, how affected, when time of payment of interest does not correspond with provisions of statute.**—Where the rate of interest which bonds bear does not exceed that provided by the statute authorizing the issue of

[1] Purcell *v.* Town of Bear Creek, 138 Ill. 524; Lower *v.* United States, 91 U. S. 536; Mix *v.* Ross, 57 Ill. 121; County of Hardin *v.* McFarlan, 82 Ill. 139; Webster *v.* People, 98 Ill. 343; Locke *v.* Davison, 111 Ill. 19.

[2] Priett *v.* De La Montania, 85 Cal. 148, 24 Pac. R. 612, reversing, 22 Pac. R. 171; Priett *v.* Hubert, 62 Cal. 9.

[3] Chicago, etc., Railroad Company *v.* City of Aurora, 99 Ill. 205; Erlinger *v.* The People, 36 Ill. 458; State *v.* Findley, 10 Ohio St. 51.

[4] United States *v.* Town of Cicero, 41 Fed. R. 83.

bonds, though the time of payment may vary from that provided in the statute, yet the bonds will be held valid. Thus where a statute, under which the bonds and coupons were authorized to be issued, provided that the bonds should bear seven per cent. interest payable annually, whereas the bonds upon which suit was brought bore seven per cent. interest payable semi-annually, it was asserted that this change in having the bonds payable semi-annually, instead of annually as the statute provided, rendered them absolutely void upon their face. The United States district court for the northern district of Mississippi, in passing upon this question, held that this was an insufficient defense, and hence the bonds were declared to be valid.[1]

The same rule has been upheld by the supreme court of the United States in several well considered cases.[2]

The fact that in some of the years past a municipality has omitted to levy the special tax provided for in the legislative act, to pay the bonds of the municipality, does not give the bond-holders the right to have such omissions made good by mandamus, if they acquiesced in the omission to make the levies.[3]

§ 395. **Interest on corporate bonds after maturity for which no coupons were given.**—Where corporate bonds were issued, payable ten years after date with interest at the rate of ten per cent. per annum, with coupons attached for the annual interest up to the maturity of the bonds, such bonds will bear interest at the same rate after their maturity, though no coupons are given for such interest.[4] As elsewhere shown, where no express provision is made as to the rate of interest after maturity, the better opinion seems to be that the conventional rate may be recovered, although there is much conflict among the

[1] Mobile Savings Bank *v.* Board of Supervisors, 24 Fed. R. 110.

[2] Commissioners *v.* Clark, 94 U. S. 278; Meyer *v.* City of Muscatine, 1 Wall. 384.

[3] United States *v.* Town of Cicero, 41 Fed. R. 83; United States *v.* County of Macon, 99 U. S. 582; Ralls Co. Ct. *v.* United States, 105 U. S. 733.

[4] People *v.* Getzendaner, 137 Ill. 234; Phinney *v.* Bladwin, 16 Ill. 108; Etbyre *v.* McDaniel, 28 Ill. 201; Ohio *v.* Frank, 103 U. S. 697; Pruyn *v.* City of Milwaukee, 18 Wis. 386.

authorities, and the supreme court of the United States will follow the local rule, although that court has in other cases committed itself to the minority rule.[1]

§ 396. **Rule of construction as to the validity of execution of municipal bonds.**—That full value has been paid for municipal bonds will not remedy failure to execute them according to the terms of the act under which they were issued; but any doubt as to the construction of the statute should generally be resolved in favor of a *bona fide* holder.[2] This is true, at least, where there is no doubt as to the power to issue them.

[1] Tied. Commerc. Paper, § 412. See *ante*, § 252.

[2] Town of Aroma *v.* Auditor of State, 15 Fed. R. 843.

CHAPTER XIX.

THE RIGHTS AND REMEDIES OF HOLDERS OF MUNICIPAL SECURITIES.

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Rights of Bona Fide Holders.

§ 397. **The doctrine of the supreme court of the United States.**—The doctrine is firmly established in the supreme court of the United States that a *bona fide* purchaser of municipal securities for value before maturity takes them freed from all infirmities in their origin; the only exception being where the securities are absolutely void for want of power in the maker to issue them or where the circulation is prohibited by law on account of the illegality of the consideration. A purchaser of municipal bonds from a *bona fide* holder, who had obtained them for value before maturity, takes them equally freed as in the hands of such holder, though he may have had notice of infirmities in their origin.[1]

Bonds executed by a municipal corporation to aid in the construction of a railroad, in pursuance of a power conferred by the legislature, are valid commercial instruments, and the purchaser of them for value in the usual course of business before they are due has a good title, free of prior equities between antecedent parties.[2]

The supreme court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation, even

[1] Cromwell *v.* County of Sac, 96 U. S. 51.

[2] Comrs. of Marion Co. *v.* Clark, 94 U. S. 278.

when made on legal grounds deemed solid by the state courts, as well as by municipalities which had been deceived and defrauded. That such securities have any general value left is largely due to the course of adjudication in respect thereto by the supreme court, and the reliance which is felt by the public that it will stand firmly by the doctrines it has so frequently asserted.[1]

Justice Grier, of the supreme court of the United States, speaking upon this subject, used the following forcible language: "Although we doubt not the facts stated as to the atrocious frauds which have been practiced in some counties, in issuing and obtaining these bonds, we can not agree to overrule our own decisions and change the law to suit hard cases. The epidemic insanity of the people, the folly of county officers, the knavery of railroad speculators are pleas which might have just weight in an application to restrain the issue or negotiation of these bonds, but can not prevail to authorize their repudiation, after they have been negotiated, and have gone into the possession of *bona fide* holders." [2]

§ 398. **Limitations as to the rights of bona fide holders.**— Where the power is clearly given, and securities have been issued in conformity therewith, they will stand on the same basis and be entitled to the same privileges as public securities and commercial paper generally. But where the power has not been given, parties must take municipal orders, drafts, certificates and other documents of the sort at their peril. Custom and usage may have so far assimilated them to regular commercial paper as to make them negotiable, that is, transferable by delivery or indorsement. This quality renders them more convenient for the purpose of the holder, and has, undoubtedly, led to the idea so frequently, but, as we think, erroneously entertained, that they are invested with that other characteristic of commercial paper, freedom from all legal and equitable defenses in the hands of a *bona fide* holder. But every holder of a city order or certificate knows that to be valid and genuine at all it must have been issued as a voucher for city

[1] 1 Dillon on Mun. Corp., § 511. [2] Mercer Co. *v.* Hackett, 1 Wall. 83.

indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purposes, and their acts can not create an estoppel against the city itself, its tax-payers or people. Persons receiving it from them know whether it has been issued, and whether they received it for a proper purpose and a proper consideration. Of course they are affected by the absence of these essential ingredients; and all subsequent holders can take *cum onere*, and are affected by the same defect.[1]

The rule is now firmly established in the supreme court of the United States that whenever a negotiable bond has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition. This doctrine, as well as one which protects the purchaser without notice, says Story, "is indispensable to the security and circulation of negotiable instruments, and it is founded on the most comprehensive and liberal principles of public policy."

Hence, the only limitations or exceptions to this doctrine are those where the securities are absolutely void, as when issued by parties having no authority to contract, or where they are void for want of power to issue them.[3]

§ 399. **Who are bona fide holders.**—This subject was under consideration by the supreme court of the United States in a case from Kansas involving the validity of certain bonds issued for the construction of a township bridge. Chief Justice

[1] Mayor *v.* Ray, 19 Wall. 468.
[2] Story on Promissory Notes, § 191.
[3] Cromwell *v.* County of Sac, 96 U. S. 51.

Waite declared that "A *bona fide* holder is a purchaser for value without notice, or the successor of such purchaser."[1]

In another case, involving the validity of certain railroad bonds in the supreme court, Justice Bradley said: "One who purchases railroad bonds in open market, supposing them to be valid, and having no notice to the contrary, will be deemed a *bona fide* holder."[2]

This question was directly passed upon by the supreme court in the case of The Commissioners of Douglass County *v.* Bolles.[3] One of the issues in that case was whether the plaintiffs were *bona fide* holders of certain municipal bonds. After stating that the legal presumption was that they were, the court, speaking by Mr. Justice Strong, said: "The plaintiffs are not forced to rest on the mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defense. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of these predecessors they have succeeded. Certainly the railroad company paid for the bonds by paying an equal amount of their stock, which the county now holds; and nothing in the special facts found show that the company knew of any irregularity or fraud in their issue, * * * and still more, the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretense that he had notice of anything that should have made him doubt their validity. Why was he not a *bona fide* purchaser for value? The law is undoubted that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights."[4]

So, if any previous holder of the bonds in suit was a *bona fide* holder for value, the plaintiff can avail himself of such

[1] McClure *v.* Township of Oxford, 94 U. S. 429.

[2] Galveston, etc., R. R. Co. *v.* Cowdrey, 11 Wall. 459.

[3] Commissioners of Douglass County *v.* Bolles, 94 U. S. 104.

[4] Commissioners of Douglass Co. *v.* Bolles, 94 U. S. 109; Montclair *v.* Ramsdell, 107 U. S. 147.

previous holder's position without showing that he himself has paid value.[1]

As a general rule, one who purchases municipal bonds subsequent to their delivery to the railroad company, and at any time prior to the time fixed for their payment, must be regarded as a *bona fide* purchaser.[2]

Negotiable promissory notes of a purchaser of municipal bonds are a sufficient consideration for their sale to make the holder a *bona fide* purchaser.[3]

One who takes bonds as collateral security for a valid debt, for which he holds no other security, and which the bonds fall short of securing, is a purchaser for value, and is entitled to all the rights of a *bona fide* holder for value, among which is the right to enforce payment from the stockholders of the company which issued them.[4]

But there can be no *bona fide* holder of bonds, within the meaning of the law applicable to negotiable paper, which have been issued without authority, that is, where there is no power to issue them.[5]

§ 400. **Presumption as to the validity of bonds.**—When a person purchases municipal bonds in open market, the *prima facie* presumption is that he acquired the bonds before they were due; that he paid a valuable consideration for the same; and that he took them without notice of any defect which would render them invalid. And when a corporation has power, under any circumstances, to issue municipal securities,

[1] Montclair *v.* Ramsdell, 107 U. S. 147.

[2] Humboldt Township *v.* Long, 92 U. S. 642; Town of Venice *v.* Murdock, 92 U. S. 494; Town of Genoa *v.* Woodruff, 92 U. S. 502.

[3] Orleans *v.* Platt, 99 U. S. 676.

[4] Sayles *v.* Garrett, 110 U. S. 288; Allen *v.* Dallas, etc., Co., 3 Woods 316. Or, in payment of an antecedent debt, Mobile, etc., Bank *v.* Oktibbeha County, 24 Fed. R. 110; Foote *v.* Hancock, 15 Blatch. 343. See, also, Swift *v.* Tyson, 16 Pet. 1. But compare Busenbarke *v.* Ramey, 53 Ind. 499, and cases cited.

[5] Cagwin *v.* Town of Hancock, 84 N. Y. 532; Township of East Oakland *v.* Skinner, 94 U. S. 255. See, also, German Savings Bank *v.* Franklin County, 128 U. S. 526; Harshman *v.* Bates County, 92 U. S. 569; St. Joseph Tp. *v.* Rogers. 16 Wall. 644; Agawam Nat. Bank *v.* South Hadley, 128 Mass. 503; Borough of Millerstown *v.* Frederick, 114 Pa. St. 435; Eddy *v.* People, 127 Ill. 428; Hewitt *v.* Board, etc., of Normal School Dist., 94 Ill. 528.

the *bona fide* holder generally has the right to presume that they were issued under the circumstances which give the requisite authority.[1]

If the legal authority under which the public agents acted is sufficiently comprehensive, a party taking the bonds has a right to presume that those empowered to act and acting under it, have complied with its requirements.[2]

Where the purchaser of county bonds was apprised by the state law that the power existed in the county court to issue the bonds to a railroad company without any election of the people, and there was nothing on their face to show that they were not regularly issued, it was not incumbent upon him to inquire whether the railroad company had pursued all the steps necessary to entitle it to receive the bonds. He had a right to presume that they were lawfully entitled to them.[3]

The holder of a municipal security, in the absence of proof to the contrary, is presumed to have taken it before due, for a valuable consideration and without notice of any objection to which it was liable. And if a municipality could, under any circumstances, issue municipal securities, the *bona fide* holder of them has a right to presume they were issued under the circumstances which give the authority, and they are no more liable to be impeached in his hands for any infirmity than any other commercial paper.[4]

Where a corporation has lawful authority to issue bonds and does so, the *bona fide* holder has a right to presume that the power was properly exercised, and is not bound to look beyond the question of its existence.[5]

The holder of municipal securities is presumed to have acquired them in good faith and for value. But if in suit upon them, the defense may be such as to require the holder to

[1] City of Lexington *v.* Butler, 14 Wall. 282.

[2] Mayor *v.* Muscatine, 1 Wall. 384.

[3] County of Henry *v.* Nicolay, 95 U. S. 619.

[4] San Antonio *v.* MeHaffy, 96 U. S. 312; Supervisors *v.* Schenck, 5 Wall. 772; City of San Antonio *v.* Lane, 32 Tex. 405.

[5] Pompton *v.* Cooper Union, 101 U. S. 196; Gelpcke *v.* City of Dubuque, 1 Wall. 175.

show that value was paid, it is not, in every case, essential to prove that he paid value.[1]

Where it is declared in the bonds that they were issued pursuant to the statute authorizing a municipality to borrow money for a loan to the municipality, *bona fide* holders of the bonds, whether so by indorsement or delivery, have a right to presume that the bonds have been lawfully issued.[2]

§ 401. **As to prior equities between original parties.**—Coupons attached as interest warrants to bonds for the payment of money, lawfully issued by municipal corporations, as well as the bonds to which they are attached, when they are payable to order and are indorsed in blank, or are made payable to bearer, are transferable by delivery, and are subject to the same rules and regulations, so far as respect the title and rights of the holders, as negotiable bills of exchange and promissory notes. Holders of such instruments, if the same are indorsed in blank, or are payable to bearer, are as effectually shielded from the defense of prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments.[3]

Whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with like immunities. If any intermediate holder between the plaintiff and defendant take negotiable paper under such circumstances as would entitle him to recover against the defendant, the plaintiff will have the same right, even though he may have purchased with a knowledge of its infirmity as between the original parties.[4]

§ 402. **Doctrine of negligence as affecting the rights of bona fide holders.**—In determining what constitutes a *bona fide* holder of commercial paper, and in what way it may be ac-

[1] Montclair *v.* Ramsdell, 107 U. S. 147.

[2] Moran *v.* Comrs. of Miami Co., 2 Black (U. S.) 722.

[3] City of Lexington *v.* Butler, 14 Wall. 282; Moran *v.* Comrs. of Miami Co., 2 Black 722; Mercer Co. *v.* Hacket, 1 Wall. 83.

[4] Scotland Co. *v.* Hill, 132 U. S. 107.

quired, the court of appeals of the state of New York has held that he is not bound to make inquiries, nor to act upon circumstances which would put an ordinary careful man upon inquiry, unless they are of such a character as would impeach the honesty of the holder. Gross negligence, even, has been held insufficient to impeach this holding, when a party has given consideration for the bill.[1]

The law is well settled in the supreme court of the United States that a party who takes negotiable paper before due, for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. The same principles apply to municipal securities.[2]

§ 403. **Doctrine of notice to bona fide holders of defects.**— A *bona fide* holder of municipal bonds who is protected from defects in their issue, except as already explained, is one who had no knowledge of the defects, because if he has knowledge of the defects in the issuance of bonds, he is placed on the same footing as the original parties to the transaction. And any defense that would be good between the original parties would be good as to a subsequent holder who has notice of the equities or defects set up as a defense to the bonds. Notice is not confined to recitals in the bonds. It is immaterial how the purchaser gets the information that they are defects in the issue of the bonds; it is the fact that he has knowledge of the defects that binds him and puts him in the same position as the original payee of the bond, who is bound to see that all the conditions of the issue have been fully complied with. There is, however, an important qualification to this rule of notice, as affecting the purchasers of municipal bonds. As a corollary from the doctrine that a *bona fide* holder without notice has absolute title, arising from possession of the bonds, is deduced the rule

[1] Griggs *v.* Howe, 3 Keyes 166; Birdsall *v.* Russell, 29 N. Y. 220; Williams *v.* Tilt, 36 N. Y. 319; Park Bank *v.* Watson, 42 N. Y. 490; Welch *v.* Sage, 47 N. Y. 143; Seybel *v.* National Bank, 54 N. Y. 288; Goodman *v.* Simonds, 20 How. (U. S.) 343; Clark *v.* Evans, 66 Fed. R. 263.

[2] Murray *v.* Lardner, 2 Wall. 110; Hotchkiss *v.* National Shoe and Leather Bank, 21 Wall. 354.

that it transmits to any one a good title; for if he could not the title thus assured to him would be of little value.

Possession, even without explanation, is *prima facie* evidence that the holder is the proper owner or lawful possessor of the instruments; and it seems that nothing short of fraud or bad faith, not even gross negligence, is sufficient to overcome the presumption and invalidate the title of the holder, as inferred from his actual custody of the instruments.[1]

§ 404. **The doctrine as to second indorsee.**—It follows that where the first indorsee purchases the instrument before due and pays value without any notice of any prior equities, the second indorsee holding under the first takes a good title, even though he has notice of such prior equities, if he purchased the instrument in the regular course of business before due, for the reason that it took a new and independent title under another indorser. Notice of such prior equities can not affect the title of the second holder, if he acquired title from a prior holder who had no such knowledge.[2]

§ 405. **Title of bona fide holder, how defeated.**—A purchaser of municipal securities before due for a valuable consideration, without knowledge of any defect of title and in good faith holds it by a title valid against the world. Suspicion of defect of title or the knowledge of circumstances which would incite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not necessarily defeat its title; that result can be produced only by bad faith on his part. And the burden of proof lies on the person who assails the right of the party in possession. These principles apply to the sale of stolen negotiable bonds. Mr. Justice Swayne in delivering the opinion

[1] Goodman *v.* Simonds, 20 How. (U. S.) 343; Collins *v.* Gilbert, 94 U. S. 753; Brown *v.* Spofford, 95 U. S. 476; Comrs. of Marion County *v.* Clark, 94 U. S. 278. This is the prevailing rule, although in a few states it is otherwise. But supicious circumstances and gross negligence may be evidence of bad faith.

[2] Story on Notes, § 196; Story on Bills, § 220; Bailey *v.* Bidwell, 13 M. & W. 73; Comrs. of Marion Co. *v.* Clark, 94 U. S. 278; Cromwell *v.* County of Sac, 96 U. S. 51.

of the court, in a leading case upon this subject, said: "We are well aware of the importance of the principle involved in this inquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep rooted and wide branching. It ramifies in every direction and its fruits enter daily into the affairs of persons in all conditions of life. While courts should be careful not to so shape or apply the rule as to invite aggression or give any easy triumph to fraud, they should not forget the consideration of equal importance which lie in the other direction."[1]

The title of the person who takes negotiable paper before due for a valuable consideration can only be defeated by showing bad faith in him, and this implies guilty knowledge or willful ignorance of the facts impairing the title of the party from whom he received it.[2]

§ 406. **Stolen bonds, when valid.**—Municipal bonds, in this respect, stand upon precisely the same footing as other negotiable paper. Thus, where municipal bonds had been taken from the vaults of a bank by burglars, and the theft advertised by the true owners, and the bonds had found their way into the market, the purchasers for value in good faith were allowed to enforce their payment, notwithstanding the bonds had been stolen. As said by the supreme court of Pennsylvania, the latest decision, both in England and this country, have set strongly in favor of the principle that nothing but clear evidence of knowledge or notice, fraud or *mala fides* can impeach the title of a holder of negotiable paper taken before maturity.[3]

§ 407. **Dealers in bonds are charged with notice of statute under which they are issued.**—Dealers in municipal bonds are

[1] Murray *v.* Lardner, 2 Wall. 110.

[2] Hotchkiss *v.* National Banks, 21 Wall. 354; Clark *v.* Evans, 66 Fed. R. 263.

[3] Battles & Webster *v.* Laundenslager, 84 Pa. St. 446; City of Elizabeth *v.* Force, 29 N. J. Eq. 587; Dutchess, etc., Insurance Co. *v.* Hachfield, 73 N. Y. 226; Birdsell *v.* Russell, 29 N.Y. 220; Commonwealth *v.* Savings Bank, 98 Mass. 12; Shipley *v.* Carroll, 45 Ill. 285; Cooke *v.* United States, 91 U. S. 389. But see District of Columbia *v.* Cornell, 130 U. S. 655; Branch *v.* Comrs. of Sinking Fund, 80 Va. 427, 56 Am. R. 596. See *ante*, § 239.

charged with notice of the laws of the state granting power to issue the bonds they find on the market. This has always been the rule adopted by the supreme court of the United States. And if power exists in a municipality a *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power no legal liability can be created.[1]

Chief Justice Waite said: "Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bonds, the holder can not require the municipal authorities to levy a tax for that purpose.[2]

§ 408. **Illustrations.**—A purchaser for value and before maturity of bonds of a county in Colorado is charged with the duty of examining the record of indebtedness provided for in the statute of that state, in order to ascertain whether the bonds increased the indebtedness of a county beyond the limits of indebtedness of a state; the recitals in such bonds do not estop the county to prove by the records of the assessment and the indebtedness that the bonds were issued in violation of the state constitution.[3]

The purchaser or holder of municipal bonds is chargeable with notice of the requirements of the law under which they are issued.[4]

Where bonds of a county are issued in pursuance of a public statute of a state, any person dealing in them is chargeable with a knowledge of it.[5]

Municipal corporations, unless authorized by their charters, have no power to make and place in the market commercial paper, and all persons dealing in municipal bonds issued by

[1] Anthony *v.* County of Jasper, 101 U. S. 693.

[2] Huidekoper *v.* Macon Co., 99 U. S. 582.

[3] Sutliff *v.* Lake County Comrs., 147 U. S. 230.

[4] Barnett *v.* Denison, 145 U. S. 135.

[5] Comrs. of Knox Co. *v.* Aspinwall, 21 How. 539.

the officers of a school district must see that the power exists. There is no presumption that much paper has been issued within the scope of their power as is the case with corporations created for business purposes.

Municipal bonds issued without power are void in whosoever hands they may be found. Thus it has been held that a bond issued by the board of education of a school district, not for the purpose of raising money to purchase a school site, or for erecting a school building, they having no power under the statute to issue such paper for any other purpose, is void even in the hands of a person taking without notice as no one can be an innocent purchaser of such void paper.[1]

§ 409. **Bonds when void as against bona fide holder.**—There can be no *bona fide* holder of municipal securities where the statute did not authorize the issue of such securities. The objection in such cases goes to the point of power. There is an entire want of jurisdiction over the subject. It is not a case of informality, and irregularity, fraud or excess of authority in an authorized agent. Where there is a total want of authority to issue commercial securities, there can be no such thing as a *bona fide* holding.[2]

A municipal corporation can not issue bonds in aid of extraneous objects without legislative authority. All persons dealing with such bonds must take notice of such want of power at their peril. The want of any legislative authority in a municipality to issue bonds is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them.[3]

A holder for value of municipal bonds is not affected by any irregularities, or fraud or unfounded assumption of authority

[1] Hewitt *v.* Normal School District, 94 Ill. 528; Board of Supervisors *v.* Farwell, 25 Ill. 183; Clark *v.* Board, etc., of Hancock Co., 27 Ill. 305; Supervisors of Marshall Co. *v.* Cook, 38 Ill. 44; Wiley *v.* Silliman, 62 Ill. 170; Harding *v.* Railroad Company, 65 Ill. 90; School Directors *v.* Fogleman, 76 Ill. 189; Sherlock *v.* Winnetka, 59 Ill. 389.

[2] Township of East Oakland *v.* Skinner, 94 U. S. 255.

[3] Town of South Ottawa *v.* Perkins, 94 U. S. 260; Supervisors of Kendall Co. *v.* Post, 94 U. S. 260.

on the part of the agents of the municipality. But good faith is unavailing where there is an entire want of authority in those who profess to act.[1]

Municipal corporations have not the power, without legislative authority expressly or clearly implied, to issue municipal securities of a commercial character free from equitable defenses in the hands of *bona fide* holders. The officers of such a corporation can not, like the officers of a private corporation, create by their acts an estoppel against corporations, its taxpayers or people, so as to render illegal issues of such securities not authorized by law valid in the hands of *bona fide* holders for value.[2]

Where there was no authority in law for issuing municipal bonds, no recovery can be had in an action upon the bonds or coupons.[3]

Although the charter of a Missouri railroad company authorized the taxable inhabitants of the "strip of country designated to vote upon themselves to take stock, and required the county court to levy and collect such a tax, if voted, and pay over the money, as fast as collected, to the treasurer of the company," it was held that this gave no authority for the county to issue bonds in anticipation of the facts. And every holder of a municipal bond is chargeable with notice of the provisions of the law by which its issuance was authorized. If there was no law for such issuing, there can be no valid bonds.[4]

Article 12, section 14, of the constitution of Mississippi, adopted December 1, 1869, provides as follows: "The legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election or regular election, to be held therein, shall assent thereto." A city in that state subscribed for stock in a railroad corporation, after what

[1] County of Dallas *v.* MacKenzie, 94 U. S. 660.

[2] Mayor *v.* Ray, 19 Wall. 468; Nashville *v.* Lindsay, 19 Wall. 485.

[3] Wells *v.* Supervisors, 102 U. S. 625.

[4] Ogden *v.* County of Daviess, 102 U. S. 634.

was called a "special election was held," but neither the election nor the subscription was authorized by any act of the legislature. Afterwards the legislature passed an act providing "that all subscriptions to the capital stock of the corporation, made by any county, city or town in this state, which were not made in violation of the constitution of this state, are hereby legalized, ratified and confirmed." Thereafter the city issued bonds to pay for its subscription. In a suit against the city by a *bona fide* holder of coupons cut from the bonds, to recover their amount, it was held by the supreme court that the bonds were void for want of power to issue them, notwithstanding any recitals on their face, or any acts *in pais*, claimed to operate by way of estoppel.[1]

All persons taking securities of municipalities having only such special power must see to it that the conditions prescribed for the exercise of the power existed. As an essential preliminary to protection as a *bona fide* holder, authority to issue them must appear. If such authority did not exist, the doctrine of protection to a *bona fide* purchaser has no application. This is the rule even with commercial paper purported to be issued under a delegated authority. The delegation must be first established before the doctrine can come in for consideration.[2]

Where there is an entire absence of power, as distinguished from a defective execution of the power, then the recitals of those invested with the ministerial duty of issuing the bonds will afford no protection even to a *bona fide* holder for value. If such bonds are issued without legislative authority, they are void, and the levy of taxes and payment of interest will not render them valid.[3]

The rule just stated is also applicable where bonds are issued in excess of the limit prescribed by the constitution. If the constitutional limit of indebtedness has already been reached, it would seem that there is an absolute want of power

[1] Hayes *v.* Holly Springs, 114 U. S. 120.

[2] Merchants' Bank *v.* Bergen Co., 115 U. S. 384.

[3] German Bank *v.* Franklin Co., 128 U. S. 526; Loan Association *v.* Topeka, 20 Wall. 655. See, also, St. Joseph Tp. *v.* Rogers, 16 Wall. 644; Northern Bank *v.* Porter Tp., 110 U. S. 608; Duke *v.* Brown, 96 N. Car. 127; Williamson *v.* City of Keokuk, 44 Iowa 88.

to create a further indebtedness by the issuance of bonds, and that neither acts of the municipality nor recitals in the bonds can validate them.[1]

§ 410. **When proceedings relating to municipal securities impair the obligation of contract.**—A municipal corporation under an ordinance authorized by its charter issued bonds to provide the funds for building a market house. By the terms of the bonds the revenue of the market was to be devoted to the interest of the bonds and to form a sinking fund to redeem them. It was held that the ordinance was authorized by the charter and therefore valid; that it constituted a contract between the holders of the bonds and the city and that subsequent ordinances of the city making any other disposition of the market revenues were void, and that so much of a charter granted the city after the issue of the bonds as authorized the city council to divert any of such revenues from the special fund as contracted in the ordinance under which the bonds were issued was inoperative, as impairing the obligation of a contract within the meaning of the federal constitution.[2]

§ 411. **Illustrations.**—An act requiring the holder of a municipal warrant, which is overdue and which draws ten per cent. interest per annum, to present the same at the treasury, and surrender it and take in its place bonds bearing interest at seven per cent. per annum, payable at a distant day, impairs the obligation of a contract within the meaning of the constitution, and is, therefore, unconstitutional and void.[3]

[1] Buchanan *v.* Litchfield, 102 U. S. 278; Katzenberger *v.* Aberdeen, 121 U. S. 172; Lake County *v.* Rollins, 130 U. S. 662; Dixon County *v.* Field, 111 U. S. 83; Sutliff *v.* Lake County Comrs., 147 U. S. 230; Hedges *v.* Dixon County, 150 U. S. 182, 14 Sup. Ct. R. 71.

[2] Franzende *v.* City of Houston, 24 Fed. R. 95; Seibert *v.* United States, 122 U. S. 284, 7 Sup. Ct. R. 1190; Lehigh Water Co. *v.* Borough of Easton, 121 U.S. 388, 7 Sup. Ct. R. 916; Water-Works Co. *v.* Water-Works Company, 120 U. S. 64; Fisk *v.* Police Jury, 6 Sup. Ct. R. 331; Monongahela Bridge Co. *v.* Railway Co. (Pa.), 8 Atlantic R. 233; Coast Line Railroad Company *v.* City of Savannah, 30 Fed. R. 646; Willis *v.* Miller, 29 Fed. R. 238; Saginaw Gas Light Co. *v.* City of Saginaw, 28 Fed. R. 529. See, also, *ante*, § 120.

[3] Brewer *v.* Otoe Co., 1 Neb. 373. See, also, Fletcher *v.* Peck, 6 Cranch 87; State of New Jersey *v.* Wilson, 7 Cranch 164; Terrett *v.* Taylor, 9 Cranch

A county in Idaho issued bonds under an act of the legislature providing that ten per cent. of such bonds should be paid in ten years from the date of the issue, and ten per cent. annually thereafter until fully paid; that taxes should be levied to provide for the payment of principal and interest, and that the faith, credit and all taxable property within the limits of the county as constituted at the time of issuing the bonds should be pledged for the payment thereof, but that segregated territory must be relieved of such taxation when the county acquiring such territory should pay to the county losing the same the corresponding portion of the indebtedness of such county. After the issue of the bonds the county was divided, part of its territory being erected into two new counties, part annexed to another county. The act making such division provided that the proportionate shares of the debt of the county which issued the bonds should be ascertained in the manner therein provided upon the basis of the assessed valuation of the land contained in the several counties as constructed, in the year prior to the division, and that the new counties and that portion which was annexed to another county should deliver to the county which issued the bonds their interest-bearing warrants for their proportional shares of such debt; ten per cent. thereof payable in eight years and ten per cent. annually thereafter until fully paid. It was held by the United States circuit court for the district of Idaho that such act did not impair the obligation of the contract of the county which issued the bonds, with the holders of such bonds, and did not give the bondholders a right to proceed in equity against the separated counties to enforce contribution.[1]

§ 412. **Irregularities not valid defense to bonds in the hands of bona fide holder.**—The principle is well settled that in a suit by a *bona fide* holder against a municipal corporation to recover the amount of coupons due on bonds issued under authority of law, no questions of form merely or irregularity or fraud or

43; Dartmouth College *v.* Woodruff, 4 Wheaton 518; Green *v.* Biddle, 8 Wheaton 1; Sturges *v.* Crowninshield, 4 Wheaton 122; Woodruff *v.* Trapnall, 10 How. 190.

[1] Savings and Loan Association *v.* Alturas Co., 65 Fed. R. 677.

misconduct on the part of the agents of a corporation can be considered. The only matters left open in such cases for inquiry are the authority to issue the bonds by the laws of the state and the *bona fides* of the holder.[1]

The payment of negotiable municipal bonds in the hands of an innocent purchaser for value can not be avoided on the ground that the elections authorizing their issue were irregularly called and held, although the irregularities were such that, had the questions been raised in the proper manner and at the proper time, such bonds would have been held invalid.[2]

§ 413. **Purchaser of bonds must take notice of public records.**—Where bonds purporting to have been issued by a municipality contain no recitals of an election, or of proceedings and orders of the municipality but are mere naked promises to pay, every purchaser and holder of the securities is chargeable with notice of whatever appears upon the face of the records. If in such case it appears upon the face of the records that the commissioners had no authority to issue the bonds, the municipality could avail itself of that want of authority as a defense to an action even by a *bona fide* holder.[3]

When the laws or constitutional provisions relating to the issuance of county bonds point to the county records as evi-

[1] Rouede *v.* Mayor, etc., Jersey City, 18 Fed. R. 719; Town of East Lincoln *v.* Davenport, 94 U. S. 801; Pompton *v.* Cooper Union, 101 U. S. 196; Copper *v.* Mayor, 44 N. J. L. 634; Murray *v.* Lardner, 2 Wall. 110; Cromwell *v.* County of Sac, 96 U. S. 51; Parsons *v.* Jackson, 99 U. S. 434; Railroad Co. *v.* Sprague, 103 U. S. 756.

[2] State *v.* Board, etc., of Kiowa Co., 39 Kan. 657; Comrs. of Knox Co. *v.* Aspinwall, 21 How. 539; Gelpcke *v.* City of Dubuque, 1 Wall. 175; Supervisors *v.* Schenck, 5 Wall. 772; Lynde *v.* The County, 16 Wall. 6; Town of Coloma *v.* Eaves, 92 U. S. 484; Marcy *v.* Township of Oswego, 92 U. S. 637; Comrs. of Douglass Co. *v.* Bolles, 94 U. S. 104; Comrs. of Johnson Co. *v.* January, 94 U. S. 202; County of Warren *v.* Marcy, 97 U. S. 96; Wilson *v.* Salamanca, 99 U. S 499.

[3] Lewis *v.* Comrs. of Bourbon Co., 12 Kan. 186; Gelpcke *v.* City of Dubuque, 1 Wall. 175; Marsh *v.* Fulton Co., 10 Wall. 676; Pendleton Co. *v.* Amy, 13 Wall. 297; Comrs. of Knox Co. *v.* Aspinwall, 21 How. 539; Bissell *v.* City of Jeffersonville, 24 How. 287; Hopp *v.* Trustees of Brown Tp., 13 Ohio St. 311; State *v.* Trustees of Union Tp., 15 Ohio St. 437; Clark *v.* City of Des Moines, 19 Iowa 199; Veeder *v.* Town of Lyman, 19 Wis. 298; Starin *v.* Town of Genoa, 23 N. Y. 439; Gould *v.* The Town of Sterling, 23 N. Y. 456; The People *v.* Mead, 24 N. Y. 114, 36 N. Y. 224.

dence of facts required to authorize their issuance, such records and not the recitals in the bonds must be looked to by all persons proposing to deal in them.[1]

§ 414. **As to constructive notice of invalidity of bonds.**—The purchaser before maturity of municipal bonds payable to bearer is not, *ipso facto*, chargeable with constructive notice of their alleged invalidity because he undertook to satisfy himself by investigation that the condition necessary for the issuance had been fulfilled, and did not rely on their face. Such knowledge, when there are no marks of infirmity on the face of the bonds and no want of power in a municipality, is a question of fact. And where the officers issuing municipal bonds are invested with the power to decide whether the conditions precedent to their issue have been complied with, their recitals to that effect in the bonds, when held by a *bona fide* purchaser, are generally conclusive.[2]

But a holder of municipal bonds in which there are no recitals to estop the municipality is bound to know that they are issued under express legislative authority, and to inquire whether they are issued in the mode and for the purposes provided by the law for their issue.[3]

§ 415. **Purchasers of bonds are conclusively bound by the constitution and laws of the state.**—A purchaser of bonds is bound to know the constitutional limit of the indebtedness which the municipal corporation could lawfully incur, and where the bonds offered for sale by him exceed such limit, it has been held that he must take notice that such bonds could not be legally issued, no matter what the recitals therein might set forth.[4]

The purchase of school district bonds charges the purchaser

[1] Quaker City National Bank *v.* Nolan Co., 59 Fed. R. 660; Citizens Bank *v.* City of Terrell, 78 Tex. 456, 14 S. W. 1003; Dixon Co. *v.* Field, 111 U. S. 83; Lake Co. *v.* Graham, 130 U. S. 674; Nolan Co. *v.* State, 83 Tex. 182, 17 S. W. 823; Francis *v.* Howard Co., 54 Fed. R. 487, 50 Fed. R. 44; West Plains Tp. *v.* Sage 69 Fed. R. 943.

[2] Carrier *v.* Town of Shawangunk, 10 Fed. R. 220; Town of Coloma *v.* Eaves, 92 U. S. 484; Humboldt Township *v.* Long, 92 U. S. 642; Walnut *v.* Wade, 103 U. S. 683.

[3] Hopper *v.* Town of Covington, 8 Fed. R. 777, 118 U. S. 148.

[4] Bates *v.* Independent School District, 25 Fed. R. 192.

with knowledge of the financial condition of the district in so far as it affects the constitutional power of a district to issue bonds.[1]

Hence a purchaser of municipal bonds is bound to take notice of the constitutional limitation upon the power to incur municipal indebtedness and of the official assessments showing the value of taxable property within the municipality.[2]

§ 416. **Validity of bonds issued by de facto corporation.**— Where a *de facto* board of education, exercising all the powers and functions of such a corporation legally organized, is reorganized, and its action acquiesced in, by the state and citizens, bonds issued by it, within the powers granted to a board legally organized, are binding in the hands of a *bona fide* purchaser.[3] And it is a general rule that where there is authority of law for the creation of the corporation, and it attempts to organize and act thereunder, its organization can not be collaterally attacked for mere irregularities, and its bonds or other obligations issued before the state takes action can not be challenged upon the ground of such irregularities[4] in its organization.

Where a portion of a township is declared by a proclamation of the governor to be a city of the second class, the remainder of such township still retains its organization; the members of the township board are still *de facto* officers at least, although they may reside within the limits of the newly organized city, hence it can not divest itself of its liability to pay its indebtedness by altering its boundaries and changing its name.[5]

Notwithstanding the original organization of a county was without authority under the constitution of the state of Kansas

[1] Nesbit *v.* Independent School District, 25 Fed. R. 635; Dixon Co. *v.* Field, 111 U. S. 83.

[2] Buchanan *v.* Litchfield, 102 U. S. 278; Nesbit *v.* Riverside Independent District, 144 U. S. 610.

[3] National Life Ins. Co. *v.* Board of Education, 62 Fed. R. 778, 10 C. C. A. 637.

[4] Shapleigh *v.* City of San Angelo, 167 U. S. 646, 17 Sup. Ct. R. 957; St. Paul Gas Light, etc., Co. *v.* Village of Sandstone, — Minn. —, 75 N. W. R. 1050.

[5] Walnut Tp. *v.* Jordan, 38 Kan. 562; State *v.* Jacobs, 17 Ohio St. 143; Berlin *v.* Gorham, 34 N. H. 266; People *v.* Wren, 5 Ill. 279.

as it contained an area of less than 432 square miles by actual survey, yet, as the statute creating the county did not show that its area was less than 432 square miles, and as it was not void upon its face, and as the county had a *de facto* organization, and as the records of such organization appear regular and valid, and as the state officials proclaimed the organization, and as its validity was subsequently recognized by them and the legislature, all of the bonds issued by the county under the provisions of the statute, and in regular form, while it was so organized as a county, were held valid obligations in the hands of *bona fide* purchasers.[1]

§ 417. **As to validity of bonds issued by de facto officers.** —In a case before the supreme court of the United States from Missouri in 1881, the question arose whether county bonds issued in that state by a *de facto* county court, and sealed with the seal of the court and signed by the *de facto* president, could be impeached in the hands of an innocent holder by showing that the acting president was not a *de jure* officer. The court held that in no state is it more authoritatively settled than in Missouri that "the acts of an officer *de facto* (although his title may be bad) are valid, so far as they concern the public, or the rights of third persons, who have an interest in the things done.[2]

In this case the supreme court of Missouri said that without this rule the business of a community could not be transacted. The public are necessarily compelled to do business with an officer who is exercising the duties and privileges of an office under color of right, and to say that his acts as to strangers should be void would be productive of irreparable mischief. It would cause a suspension of business until every officer's right *de jure* was established.[3]

This is conclusive, said Chief Justice Waite. "The question here is not whether Dimmick was *de jure* probate judge of

[1] Riley *v.* Garfield Tp., 54 Kan. 463, citing State *v.* Commissioners of Garfield Co., 54 Kan. 372; School District *v.* State, 29 Kan. 57; Ashley *v.* Supervisors, 8 C. C. A. 455, 60 Fed. R. 55.

[2] State *v.* Douglass, 50 Mo. 593.

[3] The same rule was followed in the case of Harbaugh *v.* Windsor, 38 Mo. 327.

Ralls county, but whether he was acting under color of right as a justice and president of the county court. That is averred in the petition and not denied in the answer. His right to the office is one thing; his action while exercising the duties of the office another.'"[1]

§ 418. **Overissue of bonds void in the hands of bona fide holders.**—Where a municipal corporation is indebted to the full constitutional limit, bonds issued in excess of that limit are invalid, although issued to be sold and the proceeds to be applied to the payment of the legal indebtedness.[2]

A purchaser of municipal bonds is bound to take notice that the bonds are an overissue and beyond the power of a municipal corporation under the state constitution, and also of the value of the taxable property within the municipality as shown by the tax-list.[3]

Under the act of the legislature of Kentucky of 1867, the county court of Daviess county was authorized to issue bonds in aid of railroads not to exceed $250,000. Notwithstanding this limitation upon the amount of bonds that the county was authorized to issue, it issued bonds to the amount of $320,450. The supreme court of the United States held that all bonds issued in excess of the $250,000 were void, even in the hands of a purchaser for value, before maturity, and without notice of the excessive issue.[4]

§ 419. **Same subject—Illustrations.**—Municipal securities issued in excess of the amount authorized by law and containing no such recital as will work an estoppel in favor of *bona fide* holders, are invalid even in the hands of *bona fide* holders for value.[5]

[1] County of Ralls *v.* Douglass, 105 U. S. 728.

[2] Doon Township *v.* Cummins, 142 U. S. 366.

[3] Nesbit *v.* Riverside Independent District, 144 U. S. 610. See, also, *ante*, § 409.

[4] Daviess Co. *v.* Dickinson, 117 U. S. 657.

[5] Merchants' Bank *v.* Bergen Co., 115 U. S. 384; Dixon Co. *v.* Field, 111 U. S. 83; Lake Co. *v.* Graham, 130 U. S. 674; Sutliff *v.* County Comrs., 147 U. S. 230.

It has been held that the bonds first delivered until the authorized amount is reached are valid, and the rest are void.[1]

Then comes the question, said Mr. Justice Gray, in the case of Daviess County *v.* Dickinson,[2] which of the bonds are valid and which are invalid? We can have no doubt that the test is: Which were first delivered—if that can be ascertained, and without regard to the classification of the bonds according to the time of payment in the order of the county court; for, as the county court was authorized to determine at what time the bonds should be payable, any one taking a bond signed by the presiding judge and the clerk and bearing the seal of the county had the right to presume that it was valid, provided the county court had not already issued bonds to the amount limited by the statute and by the vote.

But it has been held that municipal bonds issued for an amount in excess of the statutory limit are void only as to the excess and each bond must bear a relative proportion of the loss.[3]

§ 420. **Purchaser of municipal aid bonds, when not protected.**—Where a municipality had no power to issue bonds in aid of a railroad extension, there can be no protection of the holder of such bonds as an innocent purchaser, and no ratification of a power that never existed can aid him, although the bonds were regular on their face and recite that they were issued "under the provisions" of an act of the legislature, and specify the act, and although he took them otherwise *bona fide*.[4]

§ 421. **Misnomer in municipal bonds.**—Bonds duly and lawfully issued by a municipal corporation can not be rendered

[1] Daviess Co. *v.* Dickinson, 117 U. S. 657.

[2] Daviess Co. *v.* Dickinson, 117 U. S. 657.

[3] Francis *v.* Howard Co., 50 Fed. R. 44; Nolan Co. *v.* State, 83 Tex. 182. But, as elsewhere shown, there are cases in which the entire issue will be held void and not scaled down.

[4] Thomas *v.* Town of Lansing, 14 Fed. R. 618; Marsh *v.* Fulton Co., 10 Wall. 676; Township of East Oakland *v.* Skinner, 94 U. S. 255; Town of South Ottawa *v.* Perkins, 94 U. S. 260; McClure *v.* Township of Oxford, 94 U. S. 429; Ogden *v.* County of Daviess, 102 U. S. 634; Buchanan *v.* Litchfield, 102 U. S. 278.

invalid in the hands of a *bona fide* holder by the fact that such corporation, though properly a city, has issued such bonds under the name of the village, it having been previously recognized as a village in an act of the legislature changing its name, and having levied and collected taxes, passed ordinances, and otherwise acted as a village.[1]

§ 422. **Rights of bona fide purchaser of bonds, when fraudulently issued.**—It is competent for the legislature to make the negotiability of the bonds dependent upon the delivery by the treasurer of state, and it has been held that a purchaser of such bonds, purporting upon their face to have been issued under the provisions of a statute containing such condition, is not a *bona fide* purchaser without notice, where such bonds were fraudulently issued, without being delivered by the treasurer of state.[2]

As a general rule no person can acquire rights under a void instrument, and such is the case with forged paper and public securities issued without authority. Hence it has been held that if municipal bonds are issued in payment of a subscription to a railway company without authority of law, they are void, and an innocent purchaser before their maturity acquires no rights under them to be protected. Such purchaser must look to the authority under which they purport to have been issued.[3]

§ 423. **Validity of bonds issued after repeal of city charter.**—Bonds issued by the president and clerk of the board of trustees of a city, after the charter under which they purport to have been issued has been repealed, are void even in the hands of an innocent holder, although, without any fraudulent intent, they were antedated as of a date when the law was still in force.[4]

[1] Cornell University *v.* Village of Maumee, 68 Fed. R. 418.

[2] Lewis *v.* Comrs. of Barbour Co., 3 Fed. Rep. 191. See, also, Hall *v.* Wilson, 16 Barb. (N. Y.) 548; Branch *v.* Sinking Fund, 80 Va. 427, 56 Am. R. 596.

[3] Gaddis *v.* Richland Co., 92 Ill. 119.

[4] Lehman *v.* City of San Diego, 73 Fed. R. 105.

§ 424. **Doctrine of lis pendens.**—It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, at their peril, purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor Kent, in one of the leading cases on the subject in this country, and has been confirmed by many subsequent decisions. The learned chancellor gave the history and grounds of the general doctrine of *lis pendens*, in 1815, in the case of Murray *v.* Ballou, which is the leading American case on this subject.[1]

The fundamental proposition was stated in these words: "The established rule is, that a *lis pendens*, duly prosecuted, not collusive, is notice to a purchaser so as to affect and bind his interests by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed." That case related to land, with regard to which the doctrine is uniformly applied. In the subsequent case of Murray *v.* Lylburn,[2] decided in 1817, the same doctrine was held to apply to choses in action (in that case a bond and mortgage) assigned by one of the parties *pendente lite.*

But the chancellor, with wise provision, indicated the qualification to which the rule could be subject in such cases. Speaking of the trustee, whose acts were in question, he said: "If Winter had held a number of mortgages, and other securities in trust, when the suit was commenced, it can not be pretended that he might safely defeat the object of the suit, and elude the justice of the court, by selling these securities. If he possessed cash, as the proceeds of the trust estate, or negotiable paper not due, or, perhaps, movable personal property, such as cattle, grain, etc., I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealing would require a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce; and

[1] Murray *v.* Ballou, 1 Johns. Chanc. 566.

[2] Murray *v.* Lylburn, 2 Johns. Chanc. 441.

they formed one of the specific subjects of the suit against Winter, and the injunction prohibited the sale and assignment of them, as well as the lands held in trust."

Here we have, said Justice Bradley, the whole law on the subject. Subsequent cases have only carried it out and applied it. The supreme court of the United States has put this question to rest for all time by holding that the doctrine of *lis pendens* does not apply to municipal securities. Mr. Justice Bradley, in delivering the opinion of the court in the case of Warren County *v.* Marcy, in which this subject was fully and ably discussed, used the following language: "Whilst the doctrine of constructive notice arising from *lis pendens*, though often severe, in its application, is, on the whole, a wholesome and necessary one, and founded on principles affecting the authorative administration of justice, the exception to its application is demanded by other considerations equally important as affecting the free operation of commerce, and that confidence in the instruments by which it is carried on, which is so necessary in a business community. The considerations which give rise to the exceptions apply with full force to the present case."[1]

§ 425. **Constructive notice of pendency of suit.**—A purchaser of municipal bonds of a county is not affected with constructive notice of the pendency of a suit to test the validity of such bonds. So the purchaser from an innocent holder of negotiable bonds of a county, issued under proper authority, in subscription for the stock of a railroad corporation, can recover thereon against the county, even though he himself purchased them with notice of the pendency of the suit to test the validity of such bonds, in which they were adjudged void.[2]

[1] County of Warren *v.* Marcy, 97 U. S. 96, 110; Orleans *v.* Platt, 99 U. S. 676. See, also, Tucker *v.* New Hampshire Sav. Bank, 58 N. H. 83; Board *v.* Texas. etc., R. Co., 46 Tex. 316; Leitch *v.* Wells, 48 N. Y. 585.

[2] Hill *v.* Scotland Co., 34 Fed. R. 208; Scotland County *v.* Hill, 132 U. S. 107, 10 Sup. Ct. R. 26; County of Scotland *v.* Thomas, 94 U. S. 682; County of Warren *v.* Marcy, 97 U. S. 96; Wagner *v.* Meety, 69 Mo. 150; Comrs. *v.* Clark Co., 94 U. S. 278; Cromwell *v.* County of Sac, 96 U. S. 51. But compare Scotland County *v.* Hill, 112 U. S. 183, 5 Sup. Ct. R. 93.

A *bona fide* purchaser of negotiable securities before maturity is not affected with constructive notice of a suit respecting such paper.[1]

So, it has been held that where bonds are negotiable, there is no constructive notice of any fraud or illegality, by virtue of the doctrine of *lis pendens*.[2]

§ 426. **Rights and remedies of holders of municipal warrants as determined by the various state courts.**—A creditor of a municipal corporation is not bound to receive an order on the treasurer for his claim against the corporation. He may demand payment in legal currency, and, in case of refusal, may sue upon his original cause of action and recover the amount due on his claim.[3]

But by accepting a warrant in payment, and parting with it, the payee may lose his right of action on the original debt. Such payment is a satisfaction of the amount as soon as the warrant is delivered and accepted as payment. But an unpaid warrant, as a rule, is not an extinguishment of the original debt, and the holder may abandon the warrant and sue on his original cause of action.[4]

These instrument, not having the qualities of negotiable paper, are not only subject to the defense of want of power, or *ultra vires*, to which such paper is subject, but they are also subject to the defense of fraud, or failure of consideration, both against the original holder and his assignee. Indeed, as to matters of defense, warrants of municipalities stand upon precisely the same ground as other non-negotiable paper.[5]

An ordinary county warrant on the general fund, regularly issued, constitutes a *prima facie* cause of action against the county, and an action will lie directly on it. And where such

[1] County of Cass *v.* Gillett, 100 U. S. 585.

[2] Carroll Co. *v.* Smith, 111 U. S. 556.

[3] Benson *v.* Inhabitants of Carmel, 8 Me. 110; Willey *v.* Greenfield, 30 Me. 450; State *v.* Pilsbury, 30 La. Ann. 705.

[4] Babcock *v.* Goodrich, 47 Cal. 488; Dalrymple *v.* Town of Whitington, 26 Vt. 345.

[5] Halstead *v.* Mayor of New York, 3 N. Y. 430; Hodges *v.* City of Buffalo, 2 Denio 110; Commissioners *v.* Keller, 6 Kan. 510; Clark *v.* City of Des Moines, 19 Iowa 199.

a warrant is in form payble to bearer, its possession and presentation by plaintiff at the trial is *prima facie* evidence of plaintiff's ownership, even though such ownership is denied in defendant's answer.[1]

The supreme court of Iowa has held that county warrants are not negotiable under the law merchant. And, while such warrants are assignable under the statute, and the assignee may maintain an action on them in his own name, they are subject to any defense which might be made against the payee.[2]

The supreme court of California has held that municipal warrants acquire no greater validity in the hands of other parties than they originally possess in the hands of the first holder, no matter for what consideration they may have been transferred or in what faith they may have been taken. If illegal when issued, they are illegal for all time. The protection which attends the purchaser of negotiable paper before maturity, without notice of the illegality of its consideration, does not extend to like purchasers of municipal warrants.[3]

The holder of city warrants is not bound to proceed by mandamus against the city treasurer, but may sue the city directly on the warrants.[4]

The supreme court of Oregon has held that when, in a proceeding for a mandamus to compel a county treasurer to pay plaintiff warrants held by him, duly drawn upon the treasurer, it is ascertained in an issue made upon the return of an alternative writ that the respondent had funds sufficient to pay such warrants at the time they were presented to him, applicable to the payment thereof, and that the warrants presented were legal claims against the county, the judgment should direct the issuance of a peremptory writ commanding the respondent to pay the warrants forthwith.[5]

A school warrant issued to a teacher who does not hold a legal certificate of qualification is void under the statute of North Dakota; and the fact that the school township received

[1] Hefflelman *v.* Pennington County, 3 S. D. 162, 52 N. W. R. 851.

[2] Clark *v.* Polk Co., 19 Iowa 248.

[3] People *v.* Board, etc., of Eldorado Co., 11 Cal. 170.

[4] Travelers' Ins. Co. *v.* City of Denver, 11 Colo. 434, 18 Pac. R. 556.

[5] Bush *v.* Geisey, 16 Ore. 355, 19 Pac. R. 123.

the benefit of the teacher's services does not subject the township to liability under the warrant on a *quantum meruit*. And such warrants not being negotiable so as to cut off defenses, an assignee can not recover thereon as being a *bona fide* purchaser.[1]

Where void city warrants are ratified by a vote of the people the city council can not provide for their payment out of the fund other than that on which they are drawn without creating such a fund.[2]

Municipal warrants signed by the proper officers are *prima facie* binding and legal. The presumption is that the officers have done their duty and acted within the scope of their authority. And such warrants make a *prima facie* cause of action. Impeachment must come from the defendant.[3]

In an action against a municipal corporation upon warrants, if the warrants are set out in the petition by copy, and their execution is not denied under oath, they may be admitted in evidence without proof of the genuineness of the signature, or of the authority to issue the same.[4]

A municipal corporation is not estopped, after a warrant upon its treasurer has been issued, to set up the defense of *ultra vires*, or fraud, or want or failure of consideration. As a means of protection against the abuses incidental to a municipal administration, it is essential that municipalities be allowed to avail themselves of the defense of *ultra vires*, and although municipal warrants executed by the proper authorities are *prima facie* binding and legal, it is always competent for the municipality, even after the issuance of the warrants,

[1] Goose River Bank *v.* Willow Lake School Tp., 1 N. Dak. 26, 44 N. W. R. 1002. But see Edinburgh, etc., Co. *v.* City of Mitchell, 1 S. Dak. 593, 48 N. W. R. 131.

[2] La France Fire Engine Co. *v.* Davis, 9 Wash. 600, 38 Pac. R. 154. See, also, People *v.* Austin, 11 Colo. 134, 17 Pac. R. 485.

[3] Board, etc., of Floyd Co. *v.* Day, 19 Ind. 450; Comrs. of Leavenworth Co. *v.* Keller, 6 Kan. 510; Commissioners' Court *v.* Moore, 53 Ala. 25; Clark *v.* City of Des Moines, 19 Iowa 210; Cheeney *v.* Brookfield, 60 Mo. 53; Edinburgh, etc., Co. *v.* City of Mitchell, 1 S. Dak. 593, 48 N. W. R. 131; City of Connersville *v.* Connersville Hydraulic Co., 86 Ind. 184; Ray *v.* Wilson, 29 Fla. 342, 10 So. R. 613; Brown *v.* Town Board, etc., 77 Wis. 27, 45 N. W. R. 679.

[4] Clark *v.* City of Des Moines, 19 Iowa 210.

to set up the defense of *ultra vires* or want of authority to act in the premises.[1]

In a suit on county warrants issued pursuant to the orders of the county court, in compliance with the provisions of a valid contract for the erection of a court-house, and for the precise amount which the county had agreed to pay, the county, in the absence of fraud in obtaining the contract, and of proof that the work was not done in compliance with the specification, is not entitled to a reduction from the contract price, or to insist that damages be assessed as upon a *quantum meruit*, merely because the court-house, when completed, was worth only one-third of the contract price.[2]

§ 427. **Rights of bona fide holders of coupons.**—Coupons attached as interest warrants to bonds, for the payment of money, lawfully issued by municipal corporations, as well as the bonds to which they are attached, when they are payable to order and are indorsed in blank, or are made payable to bearer, are transferrable by delivery and are subject to the same rules and regulations, so far as respects the title and rights of the holder, as negotiable bills of exchange and promissory notes. Holders of such instruments, if the same are indorsed in blank or are payable to bearer, are as effectually shielded from the effects of prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments.[3]

Such instruments are protected from defenses of the kind when in possession of an indorsee, not merely because they are negotiable, but also because they are regarded as commercial instruments, and as such are favored as well on account of the

[1] Thomas *v.* City of Richmond, 12 Wall. 349; Marsh *v.* Fulton Co., 10 Wall. 676; Webster Co. *v.* Taylor, 19 Iowa 117; Clark *v.* City of Des Moines, 19 Iowa 210. See, also, Kane *v.* School Dist., 52 Wis. 502, 9 N. W. R. 459; Grayson *v.* Latham, 84 Ala. 546, 4 So. R. 200.

[2] Thompson *v.* Searcy Co., 57 Fed. R. 1030, 6 C. C. A. 674, 12 U. S. App. 618; Shirk *v.* Pulaski Co., 4 Dill. 209, distinguished.

[3] City of Lexington *v.* Butler, 14 Wall. 282; Moran *v.* Comrs. of Miami Co., 2 Black (U. S.) 722; Mercer Co. *v.* Hackett, 1 Wall. 83; White *v.* Vermont, etc., Railroad Co., 21 How. 575; Murray *v.* Lardner, 2 Wall. 110; Gelpcke *v.* Dubuque, 1 Wall. 175; Meyer *v.* Muscatine, 1 Wall. 384.

negotiable quality as their general convenience in mercantile affairs.[1]

When a corporation has power, under any circumstances, to issue the negotiable securities, the settled rule in the supreme court of the United States is that the *bona fide* holder generally has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.[2]

In a suit by a *bona fide* holder against a municipality to recover the amount of coupons due on bonds issued under authority conferred by law, no questions of form merely, or irregularity, or fraud or misconduct on the part of the agent of the municipality can be considered.[3]

So, it has been held that a holder for value of coupons is not affected by any irregularities, or fraud, or unfounded assumption of authority on the part of the agents of the municipality. But good faith is unavailing where there is an entire want of authority in those who profess to act.[4]

Where, to a municipal bond which has several years to run, an overdue and unpaid coupon for interest is attached, that fact does not render the bond and the subsequently maturing coupons dishonored paper so as to subject them, in the hands of a purchaser for value, to defenses good against the original holder.[5]

But even a *bona fide* holder can not recover upon bonds or their coupons where there was no authority to issue the bonds.[6]

In determining the jurisdictional amount in an action in the circuit court of the United States to recover on a municipal bond, the matured coupons are to be treated as separable independent promises, and not as interest due on coupons.[7]

[1] Smith *v.* Sac Co., 11 Wall. 139; Thompson *v.* Lee Co., 3 Wall. 327; Park Bank *v.* Watson, 42 N. Y. 490.

[2] Supervisors *v.* Schenck, 5 Wall. 772; Gelpcke *v.* Dubuque, 1 Wall. 175; Smith *v.* Sac Co., 11 Wall. 139.

[3] Town of East Lincoln *v.* Davenport, 94 U. S. 801.

[4] County of Dallas *v.* McKenzie, 94 U. S. 660.

[5] Cromwell *v.* County of Sac, 96 U. S. 51.

[6] City of Brenham *v.* German-American Bank, 144 U. S. 173.

[7] Edwards *v.* Bates Co., 163 U. S. 269; Nesbit *v.* Riverside Independent

Estoppel by Recitals as a Defense to Municipal Securities.

§ 428. **Recitals in the bond that conditions have been performed, when conclusive.**—When legislative authority has been given to a municipality or its officers to issue municipal bonds, and such authority is conferred upon a municipality or its officers upon performing certain conditions preceding the issue of such bonds, as for example, a popular vote in favor of the bonds or of a subscription to the stock of a railroad company; and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been performed, their recital that it has been performed in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality. This doctrine is based upon the ground that the recital in the bond is itself a decision of the fact by the appointed tribunal.[1]

The recital in county bonds that they were issued in pursuance to the order of the board of supervisors as authorized by virtue of the laws of the state is conclusive and binding upon the county as against a *bona fide* holder; and he need not, in a suit upon them, aver or prove the performance of any of the requisites necessary to give them validity; the want of such performance is a matter of defense.[2]

Where a municipal body has lawful authority to issue bonds for negotiable securities dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by the body to which the law entrusts the power, and upon which it

District, 144 U. S. 610; Amy *v.* Dubuque, 98 U. S. 470.

[1] Comrs. of Knox Co. *v.* Aspinwall, 21 How. 544; Moran *v.* Comrs. of Miami Co., 2 Black 722; Mercer Co. *v.* Hackett, 1 Wall. 83; Supervisors *v.* Schenck, 5 Wall. 772; Bissell *v.* City of Jeffersonville, 24 How. 287; St. Joseph Tp. *v.* Rogers, 16 Wall. 644; Lynde *v.* The County of Winnebago, 16 Wall. 6; Chaffee Co. *v.* Potter, 142 U. S. 355; New Providence *v.* Halsey, 117 U. S. 336; Lake Co. *v.* Graham, 130 U. S. 674; Humboldt Tp. *v.* Long, 92 U. S. 642; Comrs. of Douglass Co. *v.* Bolles, 94 U. S. 104; Town of Coloma *v.* Eaves, 92 U. S. 484, 493; 2 Elliott R. R., § 897.

[2] Clay Co. *v.* Soc. for Sav., 104 U. S. 579; Town of Venice *v.* Murdock, 92 U. S. 494.

imposes the duty to ascertain, determine and certify this fact, before or at the time of issuing the bonds, such a certificate will estop the municipality, as against a *bona fide* purchaser of the bonds from proving its falsity in order to defeat them.[1]

But there is a distinction between cases in which bonds are authorized to be issued upon compliance with certain conditions prescribed by statute and those in which the constitution absolutely prohibits their issue, as, for instance, where the constitutional limit of indebtedness has already been reached. In the latter case the standard of validity is created by the constitution and it is not within the power of the municipality or even of the legislature to change it, either directly or indirectly, by leaving it to ministerial officers or a commission to conclusively determine and recite the facts which can be determined from the record itself.[2]

§ 429. **The rule as announced by Judge Dillon.**—Judge Dillon, in his treatise on municipal corporations, lays down the rule that if upon a true construction of the legislative enactment conferring the authority, the corporations, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that the recital of their determination of a matter *in pais* which they are authorized to decide will, in favor of a bondholder for value, bind the corporation. In other cases the general rule governing principal and agent applies and the question is as to the power of the agent *in fact and in law*, not what they have represented it to be. The only additional exception to this rule is where both parties have not equal means of knowledge as to the extent and scope of their powers, and where the particular character of their commission

[1] National Life Ins. Co. *v.* Board of Education, 62 Fed. R. 778, 10 C. C. A. 637; Travelers Ins. Co. *v.* Township of Oswego, 55 Fed. R. 361; Brown *v.* Ingalls Tp., 86 Fed. R. 261; West Plains Tp. *v.* Sage, 69 Fed. R. 943, 948; Board *v.* Howard, 83 Fed. R. 296, 298; Evansville *v.* Dennett, 161 U. S. 434, 16 Sup. Ct. R. 613.

[2] Lake County *v.* Rollins, 130 U. S. 662; Hedges *v.* Dixon County, 150 U. S. 182; Litchfield *v.* Ballou, 114 U. S. 190; Katzenberger *v.* Aberdeen, 121 U. S. 172; Sutliff *v.* Lake Co. Commissioners, 147 U. S. 230; Dixon County *v.* Field, 111 U. S. 83. But see Chaffee Co. *v.* Potter, 142 U. S. 355.

and authority is, from its nature and circumstances, peculiarly known to the officers or agents, in which case the principal will or may be bound by the false representations of the agent respecting its authority, its extent and scope.[1]

§ 430. **The doctrine as announced by Justice Bradley.**—In the consideration of this subject, Justice Bradley announced the true doctrine to be that when the law requires the vote of tax-payers, before bonds can be issued, and the supervisors of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such a vote has been given, and is also the proper officer to execute, and who does execute, the bond, and if the bonds themselves contain a statement or recital that such vote has been given, then the *bona fide* purchaser of the bonds need go back no further. He has a right to rely on the statement as a determination of the question. "But a mere execution and issue of the bonds without such recital is not," says the learned justice, "in my judgment, conclusive. It may be *prima facie* sufficient, but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject, and I do not think that the contrary has ever been decided by this court. There has been various *dicta* to the contrary; but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bonds, according to my view of the case."[2]

§ 431. **Estoppel by course of dealing.**—A municipality may, by its course of dealing, be estopped to set up as a defense to an action on its bonds any mere irregularity in the exercise of its power. Under such circumstances the holder is generally en-

[1] 2 Dillon on Mun. Corp., §§ 522, 531; Venice *v.* Murdock, 92 U. S. 494. "But where the authority to act is solely conferred by statute, which, in effect, is the letter of attorney of the officer, all persons must, at their peril, see that the act of the agent upon which he relies is within the power under which the agent acts." 2 Dillon on Mun. Corp., § 531.

[2] Town of Coloma *v.* Eaves, 92 U. S. 484, citing Lynde *v.* The County, 16 Wall. 6. See, also, Buchanan *v.* Litchfield, 102 U. S. 278; School Dist. *v.* Stone, 106 U. S. 183.

titled to the same protection as the *bona fide* holder without notice.[1]

§ 432. **Estoppel by misconduct of officers.**—A municipality can not set up, as a defense to an action on its bonds, as against a *bona fide* holder for value, the misconduct, fraud or irregularity of the officers or agents of the corporation issuing the bonds, where power to issue them exists.[2]

Corporations are as strongly bound as individuals are to a careful adherence to truth in their dealings with mankind, and they can not, by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims which their own conduct had superinduced. And where bonds of a county on their face import a compliance with the law under which they were issued, the purchasers of them, are not, as a rule, bound to look further for evidence of a compliance with the conditions annexed to the grant of power to issue them.[3]

§ 433. **Illustration.**—Thus the legislature of Michigan, which had no power to authorize a municipality to issue bonds in aid of a railroad, passed an act authorizing the electors of a village to vote an issue of bonds to make "public improvements" in the village, the money to be expended under the direction of the council "for the purpose aforesaid." The electors having duly voted in favor of the proposition the council passed an ordinance declaring that a certain railroad was "a public improvement within the village," and directing the issuance and delivery of the bonds to an agent of the railroad

[1] Bissell *v.* Jeffersonville, 24 How. 287; Supervisors *v.* Schenck, 5 Wall. 772; Rogers *v.* Burlington, 3 Wall. 654; Pendleton County *v.* Amy, 13 Wall. 297; Butler *v.* Dunham, 27 Ill. 473; People *v.* Cline, 63 Ill. 394; Logan Co. *v.* City of Lincoln, 81 Ill. 156; New Haven, etc., Railroad Co. *v.* Chatham, 48 Conn. 465; Steines *v.* Franklin Co., 48 Mo. 167; State *v.* Van Horne, 7 Ohio St. 327; Shoemaker *v.* Goshen Tp., 14 Ohio St. 569; Town of Bennington *v.* Park, 50 Vt. 178; 2 Elliott R. R., § 903.

[2] Town of East Lincoln *v.* Davenport, 94 U. S. 801; Comrs. of Johnson Co. *v.* Thayer, 94 U. S. 631; Grand Chute *v.* Winegar, 15 Wall. 355; Railroad Co. *v.* Otoe Co., 1 Dillon 338; Black *v.* Cowen, 52 Ga. 621; Lane *v.* Schomp, 20 N. J. Eq. 82.

[3] Moran *v.* Comrs. of Miami Co., 67 U. S. 722; Mercer Co. *v.* Hackett, 1 Wall. 83.

company. It was held that the action of the council was unlawful and that the bonds were invalid.[1]

This case was reversed by the United States court of appeals on the ground that if in municipal bonds, the recitals of fact taken collectively are such as naturally and reasonably would inspire the confidence and belief of purchasers in the existence of conditions which would make their issue lawful, and that was the intended and expected consequence of incorporating those recitals in the bonds, a *bona fide* purchaser would not be chargeable with notice, and defeated in his right of recovery as such, by the fact that an ordinance recited in the bonds by its date only misappropriated the bonds to an unlawful use.[2]

§ 434. **Recital that bonds are issued in conformity with law.** —It is not essential that the recital in the bonds should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice, it seems, so as to embrace every fact which the officers making the statements are authorized to determine and certify. This is the rule which has been constantly applied by the courts of the United States in the numerous cases in which it has been adjudicated. The differences in the result of the judgment have depended upon the question whether, in the particular case under consideration, a fair construction of the law authorized the officers issuing the bonds to ascertain, determine and certify the existence of the fact upon which their power, by the terms of law, was made to depend; not including, of course, that class of cases in which the controversy related not to the conditions precedent, on which the right to act at all depended, but upon conditions affecting only the mode of exercising the power admitted to have come into being.[3]

[1] Risley *v.* Village of Howell, 57 Fed. R. 544.

[2] Risley *v.* Village of Howell, 64 Fed. R. 453. The circuit court of appeals followed the doctrine laid down by the supreme court of the United States in Hackett *v.* Ottawa, 99 U. S. 86.

[3] Dixon Co. *v.* Field, 111 U. S. 83, 4 Sup. Ct. R. 315; Marcy *v.* Township of Oswego, 92 U. S. 637; Comrs. of Douglass Co. *v.* Bolles, 94 U. S. 104; Comrs. *v.* Clark, 94 U. S. 278; Paner *v.* Bowler, 107 U. S. 529; Carrol Co. *v.* Smith, 111 U. S. 556, 4 Sup. Ct. R. 539. It is admitted in most of the

In the last case just cited it was held that the recitals did not constitute an estoppel, for the reason that they amounted simply to a statement that a subscription to the capital stock of the railroad company was authorized by the statute mentioned, and that the sum mentioned in the bonds was part of it, and that the recitals did not embody even a general statement that the bonds were issued in pursuance of the statute referred to. It has been held that where the bonds recite that "they were issued in pursuance of the statute," the truth of the recital can not be denied.[1]

Bonds have been held valid although they recited that they were issued in accordance with a certain law, which had in fact been repealed, when it appeared that the bonds had been issued in substantial conformity with the laws that were in force when the securities were put in circulation.[2]

On the other hand, it has been decided that the holders of such bonds can not be aided by the recitals, for the reason that they rely upon the laws not referred to in the bonds. It is, therefore, necessary for the holder of such bonds to show a substantial compliance with the provisions of the law thus invoked.[3]

And no one can justly claim to be a *bona fide* holder of bonds when they contain recitals showing that they were not issued in accordance with any existing law.[4]

§ 435. **As to the power to deny authority of officers.**—Purchasers of municipal securities must take the risk of the gen-

cases that the recitals must be of matters of fact, which the corporate officers have authority to certify, but very general statements have been held by the supreme court of the United States to fall within the law.

[1] Third National Bank *v.* Town of Seneca Fall, 15 Fed. R. 783.

[2] Anderson Co. Comrs. *v.* Deal, 113 U. S. 237; Comrs. of Johnson Co. *v.* January, 94 U. S. 202; Knox County *v.* Ninth National Bank, 147 U. S. 91, 13 Sup. Ct. R. 267.

[3] Gilson *v.* Dayton, 123 U. S. 59; Crow *v.* Oxford, 119 U. S. 215; Deyo *v.* Otoe Co., 37 Fed. R. 246; Ninth National Bank *v.* Knox Co., 37 Fed. R. 75.

[4] Harshman *v.* Bates County, 92 U. S. 569; McClure *v.* Township of Oxford, 94 U. S. 429; County of Bates *v.* Winters, 97 U. S. 83; Anthony *v.* County of Jasper, 101 U. S. 693; Dodge *v.* County of Platte, 82 N. Y. 218; Woodruff *v.* Okolona, 57 Miss. 806; Johnson *v.* Butler, 31 La. Ann. 770; Barnes *v.* Town of Lacon, 84 Ill. 461.

uineness of the signatures of the officers who execute them and this includes not only the genuineness of the signature but also the official character of the officers. Hence no municipality can be estopped by the acts or declarations of its officers from denying their authority to bind such municipality.[1]

In Chisholm *v.* Montgomery,[2] Mr. Justice Bradley said: "Public officers can not acquire authority by declaring that they have it. They can not thus shut the mouth of the public whom they represent. The officers and agents of private corporations, entrusted by them with the management of their own business and property may estop their principals, and subject them to the consequences of their unauthorized acts. But the body politic can not be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to the peculations and frauds of public officers. I hold it to be a sound proposition, that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it."

§ 436. **Recitals of facts, when not within the authority of officers issuing bonds.**—The rule is perhaps well established that where it is not within the general scope of the authority of the officers of a municipality issuing the bonds to determine whether or not the particular condition has been performed, recitals that the bonds have been duly issued will not estop the municipality from setting up, as a defense to an action upon the bonds, their invalidity.[3]

[1] Merchants' Bank *v.* Bergen Co., 115 U. S. 384; Cowdrey *v.* Town of Canadea, 16 Fed. R. 532; Whiteside *v.* United States, 93 U. S. 247; Daviess County *v.* Dickinson, 117 U. S. 657; Concord *v.* Robinson, 121 U. S. 165; Rich *v.* Mentz Tp., 134 U. S. 632; The Floyd Acceptances, 7 Wall. 666; Chisholm *v.* City of Montgomery, 2 Woods 584; Cagwin *v.* Town of Hancock, 84 N. Y. 532; Williams *v.* Town of Roberts, 88 Ill. 11; Hudson *v.* Inhabitants of Winslow, 35 N. J. L. 437; 2 Elliott R. R., §§ 900, 902.

[2] Chisholm *v.* Montgomery, 2 Woods 584.

[3] Marsh *v.* Fulton Co., 10 Wall. 676; Loan Association *v.* Topeka, 20 Wall. 655; Buchanan *v.* Litchfield, 102 U. S. 278; Northern Bank, etc., *v.* Porter Tp. Trustees, 110 U. S. 608; Dixon Co. *v.* Field, 111 U. S. 83; Clark *v.* City of Des Moines, 19 Iowa 199; State *v.* Comrs. of Hancock Co., 11 Ohio St. 183; Gould *v.* Town of Sterling, 23 N. Y. 456; Starin *v.* The Town of Genoa, 23 N.Y. 439; People *v.* Mead, 36 N.Y. 224; De Voss *v.* City of Richmond, 18

This would clearly seem to be a just rule, but there are some cases which appear to trench upon it slightly. Thus, in a recent case, the supreme court of the United States held that a municipality was estopped by recitals in railroad aid bonds made by commissioners specially appointed by the county judge to execute the bonds, and not by the regular municipal officers.[1]

§ 437. **Estoppel by payment of interest or taxes.**—A municipal corporation may be estopped to set up a defense to an action on its bonds by payment of interest thereon for a series of years.[2]

But if the legislature was without power to authorize the issue of bonds, and the statute attempting to confer such authority is void, the mere payment of an installment of interest, which was equally unauthorized, will not work an estoppel against a municipality.[3]

While it is unquestionably true that the payment of interest will not validate a bond issued without authority of law, yet in cases where the objection is not a want of power to issue, but of compliance with a condition, in respect to which there may be an estoppel by recital or other act of the city officials, the payment of interest on the bonds under such circumstances ought to have, and has been held to have, great weight.[4]

And it is said that all questions of doubt in relation to the validity of bonds should be resolved in favor of their validity, where it clearly appears that the municipality has repeatedly

Gratt. (Va.) 338, 98 Am. Dec. 646; Cagwin *v.* Hancock, 84 N. Y. 532; Jefferson County *v.* Lewis, 20 Fla. 980; 2 Elliott R. R., §§ 900, 902.

[1] Andes *v.* Ely, 158 U. S. 312, 15 Sup. Ct. R. 954.

[2] Citizens' Saving and Loan Association *v.* Perry Co., 156 U. S. 692; Leavenworth, etc., Railroad Co. *v.* Comrs. of Douglass Co., 18 Kan. 169; New Haven, etc., Railroad Co. *v.* Chatham, 42 Conn. 465; People *v.* Cline, 63 Ill. 394; County of Clay *v.* Society for Savings, 104 U. S. 579; Parkersburg *v.* Brown, 106 U. S. 487; Anderson Co. Comrs. *v.* Beal, 113 U. S. 227; Nelson *v.* Haywood County, 87 Tenn. 781, 11 S. W. R. 885.

[3] Loan Association *v.* Topeka, 20 Wall. 655; Town of Mentz *v.* Cook, 108 N. Y. 504, 15 N. E. R. 541; Marshall Co. *v.* Cook Co., 38 Ill. 44; Lippincott *v.* Town of Pana, 92 Ill. 24.

[4] Moulton *v.* City of Evansville, 25 Fed. R. 382; Livingston County *v.* First Nat. Bank, 128 U. S. 102.

recognized the validity of the bonds by the payment of the interest on them for a series of years.[1]

The payment of interest on school bonds does not estop a school district from denying their validity where it is not shown that the officers and people of the district had full knowledge of the facts connected with the issuance and sale of the bonds. And where the law does not authorize the people of a school district to vote that bonds be issued for a specific purpose, such a vote does not make the bonds valid bonds in the hands of an innocent purchaser.[2]

The payment of taxes levied to meet accruing interest upon bonds issued in the name of a municipality will not operate to estop the tax-payers of the municipality from alleging a want of power to create the debt. This rule is in contradistinction to the case of the mere irregular or defective execution of an existing power, for in such case such a payment of taxes may well work an estoppel to set up the irregularity.[3]

§ 438. **Estoppel by retention of consideration.**—A municipality may sometimes be estopped to set up a defense to an action on its bonds by the retention of the consideration received for the bonds. Thus, where it appeared that a county, which was authorized to purchase stock on condition of a popular vote, received the stock in exchange for its bonds and held it for seventeen years before suit was brought on the bonds by an innocent holder, and still held it at the time of the action, the county was held estopped to claim the proceeds of the exchange of the bonds for the stock, and assert against the purchaser of the bonds for value that, though the legislature empowered them to make them, and put them upon the market upon certain conditions, they were issued in disregard of

[1] Portsmouth Savings Bank *v.* City of Springfield, 4 Fed. R. 276.

[2] Ashuelot National Bank *v.* School District, 41 Fed. R. 514; Lewis *v.* Board, 2 McCrary 464, 5 Fed. R. 269; State *v.* School District, 16 Neb. 182, 20 N. W. R. 209.

[3] Schaeffer *v.* Bonham, 95 Ill. 368. See, also, Town of Cherry Creek *v.* Becker, 2 N. Y. Supp. 514. But compare Town of Eminence *v.* Grasser, 81 Ky. 52.

the conditions, notwithstanding the bonds contained no recitals.[1]

So, in other cases, a municipality may sometimes be estopped to set up a defense to an action on bonds by reason of laches or by long acquiescence.[2]

§ 439. **As to estoppel before issue of bonds.**—The doctrine of estoppel does not apply to cases arising before the issue of municipal bonds.[3]

§ 440. **A recital in bonds does not estop municipality from showing that an ordinance authorizing the issue of such bonds was not published.**—A recital in bonds issued by a municipality that they are issued under a certain ordinance does not estop the municipality from showing that the ordinance was never published, and that it is, therefore, void, since neither the mayor nor clerk, who signed the bonds, have any duty in relation to publishing ordinances, or determining when they had been published according to law.[4]

§ 441. **Recitals in municipal bonds apply to matters of fact only.**—Recitals in municipal bonds do not extend to or cover matters of law. Thus, a certificate indorsed upon county bonds, reciting actual facts, and that thereby the bonds are conformable to the law, when, judicially speaking, they are not, will

[1] Pendleton Co. *v.* Amy, 13 Wall. 297; Third National Bank *v.* Town of Seneca Falls, 15 Fed. R. 783; Whiting *v.* Town of Potter, 18 Blatchf. 165, 2 Fed. R. 517; Anderson Co. Comrs. *v.* Beal, 113 U. S. 227. But see 2 Elliott R. R., § 904.

[2] Supervisors *v.* Schenck, 5 Wall. 781; Meyer *v.* The City of Muscatine, 1 Wall. 384; Town of Eminence *v.* Grasser, 81 Ky. 52; Comrs. of Morris Co. *v.* Hinchman, 31 Kan. 729; Shoemaker *v.* Goshen Tp., 14 Ohio St. 569; Bennington *v.* Park, 50 Vt. 178; Hannibal, etc., Railroad Co. *v.* Marion County, 36 Mo. 294; People *v.* Town of Santa Anna, 67 Ill. 57; People *v.* Supervisors, etc., of Logan Co., 63 Ill. 374; Town of Essex *v.* Day, 52 Conn. 483.

[3] Union Pac. Railroad Co. *v.* Lincoln Co., 3 Dillon (C. C.) 300; Railroad Co. *v.* Merrick Co., 3 Dillon 359; Portland, etc., Railroad Co. *v.* Inhabitants of Hartford, 58 Me. 23.

[4] National Bank of Commerce *v.* Town of Granada, 54 Fed. R. 100, 4 C. C. A. 212, 48 Fed R. 278, 44 Fed. R. 262; Dixon Co. *v.* Field, 111 U. S. 83, followed.

not make them so, and can not work an estoppel upon the county to claim the protection of law.[1]

In an action upon certain municipal bonds Justice Woods, of the United States circuit court for the district of Indiana, said: "The recital in the bond, it is contended, constitutes an estoppel against the denial of authority, but if the recital proposes to contain the recital of authority except as given in the act referred to—and it certainly does not propose to assert more, it would be ineffective. Recitals in such instruments can be binding only in respect to matters of fact and not in respect to matters of law, which all alike are bound to take cognizance."[2]

§ 442. **When recitals in refunding bonds will estop a municipality from showing the invalidity of the old bonds.**—Recitals in bonds issued by a city council under statutory authority, that they are refunding bonds, issued to take up "old bonds falling due," estop the city from showing, as against *bona fide* holders, that the old bonds were invalid, and, therefore, insufficient to support the issuance of the new ones.[3]

Municipalities are not estopped by recitals in their bonds, except as to matters of fact, nor even then if the facts recited are matters of public record, open to the inspection of every inquirer who ought to take notice thereof. Thus, a statute providing for the organization of counties declared that after certain steps had been taken the governor should appoint county officers upon whose qualification the county should be "deemed duly organized," and provided that no county bonds should be issued within one year thereafter. An examination of the records in the executive department of the state would

[1] Dixon Co. *v.* Field, 111 U. S. 83; Marcy *v.* Township of Oswego, 92 U. S. 637; Commissioners *v.* Bolles, 94 U. S. 104; Commissioners *v.* Clark, 94 U. S. 278; County of Warren *v.* Marcy, 97 U. S. 96; Pana *v.* Bowler, 107 U. S. 529. But see *ante*, § 434.

[2] United States *v.* Town of Cicero, 41 Fed. R. 83.

[3] City of Cadillac *v.* Moon Socket Inst. for Savings, 58 Fed. R. 935; City of Huron *v.* Second Ward Sav. Bank, 86 Fed. R. 272; Town of Coloma *v.* Eaves, 92 U. S. 484; Hackett *v.* Ottawa, 99 U. S. 86; Chaffee Co. *v.* Potter, 142 U. S. 355; Zabriskie *v.* Railroad Co., 23 How. 381; Board *v.* Howard, 83 Fed. R. 296; Bissell *v.* City of Jeffersonville, 24 How. 287.

have shown the date of the appointment of such county officers. It was held that all purchasers of bonds were charged with notice of such date, and that the county was not estopped to deny the validity of refunding bonds issued within one year thereafter as against a *bona fide* holder.[1]

[1] Coffin *v.* Board of Comrs., 57 Fed. R. 137; Sutliff *v.* Lake Co. Comrs., 147 U. S. 230; Nesbit *v.* Riverside Independent District, 144 U. S. 610; Dixon Co. *v.* Field, 111 U. S. 83; Town of Coloma *v.* Eaves, 92 U. S. 484; Marsh *v.* Fulton Co., 10 Wall. 676; Northern Bank of Toledo *v.* Porter Tp. Trustees, 110 U. S. 608; Anthony *v.* Jasper Co., 101 U. S. 693; McClure *v.* Township of Oxford, 94 U. S. 429.

CHAPTER XX.

RIGHTS AND REMEDIES—CONTINUED.

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496. Bonds issued for labor—Liability to assignee in absence of power to issue commercial paper.
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498. Action against a treasurer for money collected as taxes to pay void bonds.
499. When county commissioners may recover back money paid on void warrants.

Remedies by Mandamus.

§ 443. **Mode of ascertaining the rights of municipal creditors.**—In ascertaining the rights and remedies of municipal creditors, special reference must always be had to the legislation under which the debts were created. If the legislature authorized the creation of a debt, and provided no special mode for its payment, it is a sound proposition that it was intended that it would be paid in the usual way in which such debts are paid, that is, by the levy and collection of a tax for such purposes, provided there is nothing in the act authorizing the creation of the indebtedness to rebut such intention.[1]

Where the law under which the debt was incurred provides for the special levy of a tax to pay it, this duty will be enforced by mandamus, and in such a case it is no answer to the creditor's application for this remedy that an execution has not been returned *nulla bona*, or that the corporation debtor may have property subject to sale on execution.[2]

It is a settled doctrine of the supreme court of the United States that municipal or public corporations have no power to issue bonds in the aid of railroads, unless expressly conferred by statute, and in the act of the legislature conferring such power express provision is usually made authorizing or requiring the levy and collection of taxes, or of a special tax, to pay the indebtedness thus created. Such provisions are of great consequence to holders of municipal securities, and have often proved to be the sole legal reliance for their ultimate payment; and they are so far connected with the obligation of the contract as to come under the protection of the federal constitution, and hence they can not be impaired by subsequent legislation. Thus, where a state has authorized a municipal corporation to contract and to exercise the power of local taxation, to the extent necessary to meet its engagements, the

[1] United States *v.* New Orleans, 98 U. S. 381; Kelley *v.* Milan, 127 U. S. 139; Norton *v.* Dyersburg, 127 U. S. 160; City Council, etc., *v.* Hickman, 57 Ala. 338; Com. *v.* Perkins, 43 Pa. St. 400; State *v.* City of New Orleans, 34 La. Ann. 477.

[2] Board, etc., *v.* Aspinwall, 24 How. 376.

power thus given can not be withdrawn until the contract is satisfied. The state and the corporation in such cases are equally bound. The power given becomes a trust which the donor can not annul, and which the donee is bound to execute. Neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. And laws requiring taxes to the requisite amount to be collected, to pay municipal bonds, which were in force when the bonds were issued, can not be annulled by subsequent legislation. A subsequent act restricting the power to tax, so far as it affects the bonds, is a nullity.[1]

The remedy subsisting in a state, when and where a contract is made and is to be performed, is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the federal constitution, and is, therefore, void. And where a statute authorizing the issue of municipal bonds provides for the levy and collection of the special tax, "in the same manner as county taxes" are levied, for their payment, the obligation of the contract is impaired by any change in the remedy whereby it is rendered less efficacious than that which is at the time provided for securing the revenues of the county.[2]

§ 444. **When mandamus the remedy to enforce the payment of municipal liabilities.**—The duty of the municipality to provide for the payment of liabilities may, in all proper cases, be enforced by mandamus.[3]

But it has been generally held that if the creditor may bring suit against the corporation and obtain judgment, which may be enforced by ordinary execution, mandamus will not lie to compel payment in advance of judgment recovered.[4]

[1] Von Hoffman *v.* City of Quincy, 4 Wall. 535; Deere *v.* Rio Grande Co., 33 Fed. R. 823; *ante*, §§ 120, 410.

[2] Seibert *v.* Lewis, 122 U. S. 284.

[3] Walkley *v.* City of Muscatine, 6 Wall. 481; Mayor *v.* Lord, 9 Wall. 409; Heine *v.* Commissioners, 19 Wall. 655; Rees *v.* City of Watertown, 19 Wall. 107; United States *v.* City of Key West, 78 Fed. R. 88; Young *v.* Clarendon Township, 132 U. S. 340.

[4] State *v.* Co. Judge of Floyd Co., 5 Iowa 380; Coy *v.* City Council, etc., 17 Iowa 1; State *v.* City of Daven-

In New Jersey mandamus is the remedy where the ordinary process of execution is inadequate.[1]

In California when a money judgment is recovered against a county no execution can issue, but the board of supervisors can be compelled by mandamus to audit the claim.[2]

In Iowa the remedy against the county and upon ordinary municipal indebtedness is by suit and not by mandamus, when the indebtedness is in original form, as a simple contract debt.[3]

§ 445. **The general rule for enforcing the payment of bonds.** —As a general rule the claim of the creditor must first be reduced to a judgment and it must appear that there is no property subject to levy, and no funds in the municipal treasury which the creditor can control. The doctrine is perhaps well settled in the supreme court of the United States that where a municipality refuses to pay its bonds, the appropriate proceeding is an action at law to establish by a judgment of the court the validity of the claim and the amount due, and by the return of an ordinary execution to ascertain that no property of the municipality could be found liable to such execution, and sufficient to satisfy the judgment. Then, if the corporation has authority to levy and collect taxes for the payment of the bonds, a mandamus would issue to compel them to raise by taxation the amount necessary to pay them.[4]

Where a municipality is authorized by the legislature to create a debt of a specific character, to borrow money to pay for it, and also authorized to provide for the payment of the principal and interest of the money so borrowed, by the assessment

port, 12 Iowa 335; People *v.* Board, etc., of Clark Co., 50 Ill. 213; Knapp *v.* Mayor, etc., of Hoboken, 38 N. J. L. 371; Hugg *v.* Ivins (N. J.), 36 Atl. R. 685; State *v.* Clay Co., 46 Mo. 231; People *v.* Hawkins, 46 N. J. 9. But see *post*, § 449.

[1] State *v.* Guttenberg, 39 N. J. L. 260.

[2] Alden *v.* County of Alameda, 43 Cal. 270.

[3] State *v.* County Judge, etc., 5 Iowa 380; Coy *v.* City Council of Lyons City, 17 Iowa 1; State *v.* City of Davenport, 12 Iowa 335.

[4] Heine *v.* The Levee Comrs., 19 Wall. 655; Von Hoffman *v.* City of Quincy, 4 Wall. 535; Supervisor *v.* United States, 4 Wall. 435; Riggs *v.* Johnson Co., 6 Wall. 166; City of Galena *v.* Amy, 5 Wall. 705; Walkley *v.* City of Muscatine, 6 Wall. 481.

and collection of such taxes as may be necessary, it has been held that mandamus is the proper remedy of the holder of municipal bonds to enforce the levying and collection of taxes to pay such bonds or the interest thereon.[1]

Where, by the statute creating the debt, it is made the duty of certain municipal officers to levy and collect taxes for the payment of bonds, as, for example, bonds in aid of a railroad, and there is no valid defense alleged or claimed, and no question made as to the genuineness of the bonds, and they are in possession of the relator, it has been held that a prior judgment at law was not essential to give the right to a mandamus to compel the proper officers to levy and collect the tax. Undoubtedly, in such cases the court may award the writ without a prior judgment; but, if there is any doubt as to the validity of the debt, the court may well decline to grant the writ until applied for to enforce the judgment obtained.

There is no necessity in cases of the first class that a prior judgment should first be obtained to ascertain the amount due, because the debt is recognized by the statute; nor is there any necessity for a return of a *nulla bona*, to show the propriety of the levy of the tax, because the power or duty of making the levy is part of the statute creating the debt; yet we apprehend that even in such cases, if it be ascertained that the bonds are invalid, that they are not obligations binding on the city, the parties seeking the benefit of this extraordinary remedy would be required to establish his debt by a judgment. Thus, a mandamus was refused the holder of an order drawn by the selectmen of the town on the treasurer, upon the ground that it did not appear that the selectmen had authority to draw such an order; but in a large number of cases arising on municipal bonds issued in aid of railroads, where the defense has been set up that the bonds are void for want of power to issue them,

[1] Commonwealth *v.* City of Pittsburg, 34 Pa. St. 496; Commonwealth *v.* Comrs., 37 Pa. St. 277; State *v.* Clinton Co., 6 Ohio St. 280; Supervisors *v.* United States, 4 Wall. 435; Riggs *v.* Johnson Co., 6 Wall. 166; Board, etc., *v.* Aspinwall, 24 How. 376; Mayor *v.* Ward, 9 Wall. 409; Washington Co. *v.* United States, 9 Wall. 415; Brown *v.* Gates, 15 W. Va. 131; Comrs. Court of Limestone Co. *v.* Rather, 48 Ala. 433; Elliott Co. *v.* Kitchen, 14 Bush 289.

the question has been adjudged upon an application for a writ of mandamus, and where the relator's right was clearly established the writ was awarded; and, on the other hand, when such right was not clearly established and the court was in doubt the writ was denied.[1]

§ 446. **The power of judgment creditors to enforce payment against a municipality.**—Where the municipal authorities fail or neglect to perform the duty of levying a tax at the annual or regular meeting, they may be compelled by mandamus to meet again and do their duty, the same as if it had been performed at the proper time and place, and this without the aid of any special legislative enactment.[2]

The rule is well settled that, where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender.[3]

The language of the statute investing municipal officers with the power to levy tax is often permissive in form, and in such cases it has been asserted that the power is one which the officers may exercise as a discretionary power. Thus, a statute of Illinois provided that "the board of surveyors under township organization, in such counties as may be owing debts which their current revenues, under existing laws, are not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed in any one year one per cent. upon the taxable property of any such county, to be assessed and collected in the same manner and at the same time and rate of compensation as other county taxes, and, when collected, to be kept as a separate fund in the county treasury, and to be expended un-

[1] County of Green *v.* Daniel, 102 U. S. 187; Lexington *v.* Mulliken, 7 Gray 280; County Comrs. *v.* King, 13 Fla. 451; State *v.* Yeatman, 22 Ohio St. 546; Merrill on Mandamus, §§ 129, 130.

[2] People *v.* Supervisors of Chenango Co., 8 N. Y. 317.

[3] Amy *v.* The Supervisors, 11 Wall. 136.

der the direction of said county court or board of supervisors, as the case may be, in liquidation of such indebtedness." In a case before the supreme court of the United States from the state of Illinois, involving the construction of this statute, it appeared that the relator was the holder of certain coupon bonds of the county of Rock Island, originally issued and negotiated in payment of stock of the Warsaw and Rockford Railroad Company, for which the county had subscribed. They were issued pursuant to law. The coupons, representing the interest for one year, were paid by the county. The necessary tax was levied and collected for that purpose. At the March term, 1863, the relator recovered a judgment in the court below upon coupons overdue and unpaid, for $2,554.60 and costs. Nothing was paid upon it, and there was no money in the county treasury which could be so applied. The relator subsequently requested the supervisors to collect the requisite amount by taxation, and give to him an order on the county treasurer for payment. They declined to do either. The relator applied to the court below for a mandamus, compelling the supervisors at their next regular meeting to levy a tax of a sufficient amount to be applied to pay the judgment, interest and costs, and when collected, to apply it accordingly. An alternative writ was issued. The supervisors made a return wherein numerous objections were taken to the issuing of a mandatory writ. The court below disallowed the return and ordered that a peremptory writ should issue commanding the respondents, at their next meeting, to levy a tax for not more than one hundred cents on each one hundred dollars' worth of taxable property in the county, but of sufficient amount to pay the judgment, interest and costs, and that they set the same apart as a special fund for that purpose, and that they pay it over without unnecessary delay to the relator. It was asserted by counsel for respondent that the authority thus given by the statute involved no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that the courts can not control the discretion with which the statute had clothed them. The supreme court of the United States

held that this power was mandatory, if its exercise was necessary in order to pay the judgments rendered against the county.

The learned court places the decision on the broad principle that where power is given to public officers, in the language of the act above quoted, or in equivalent language, whenever the public interests or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with a depository to meet the demand of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose "a positive and absolute duty." The line which separates this class of cases, said Mr. Justice Swayne, from those which involve the exercise of a discretion, judicial in its nature, which courts can not control, is too obvious to require remark. This case clearly does not fall within the latter category. The judgment of the court below was accordingly affirmed and the peremptory writ of mandamus awarded to the relator.[1]

Although there may be discretion in the city council as to the amount of tax which they are authorized to levy for ordinary purposes, yet a creditor who has obtained judgment is entitled to have the whole power of a corporation exerted if necessary for the payment of the judgment.[2]

§ 447. **Mandamus to compel the issuance of bonds, when the proper remedy.**—Mandamus is the usual and appropriate, if not the only, remedy to compel the issuance by a municipality of its bonds in payment of a subscription to the capital

[1] Supervisors *v.* The United States, 4 Wall. 435.

[2] Butz *v.* City of Muscatine, 8 Wall. 575; Coy *v.* City Council, etc., 17 Iowa 1; Clark *v.* City of Davenport, 14 Iowa 494; Iowa Railroad Land Co. *v.* County of Sac, 39 Iowa 124; Commonwealth *v.* City of Pittsburg, 34 Pa. St. 496; Marion County *v.* Coler, 75 Fed. R. 352. But see City of Shermand *v.* Langham (Tex.), 40 S. W. R. 140; State *v.* Bates, — S. Car. —, 26 S. E. R. 213, and compare Board *v.* People, 8 Col. App. 43, 46 Pac. R. 107.

stock of the corporation. While mandamus is a writ largely in the discretion of the court, it would be an abuse of that discretion to refuse it when it is the only adequate remedy to enforce a party's rights.[1]

But when a city council passes, over the mayor's veto, an ordinance providing for the issue of bonds in excess of the amount of indebtedness which the city can lawfully incur, mandamus will not lie to compel the mayor to sign the bonds.[2]

§ 448. **Mandamus, when refused to compel county commissioners to call an election.**—Where a petition is presented to the board of county commissioners for the purpose of having the board order an election in a certain township, for the purpose of having the question determined whether the electors of a township will authorize a subscription to the capital stock of a certain railroad company and authorize the issue of township bonds in payment for such stock, and it appears that at the time the petition is presented, a question is pending whether or not the township shall be divided into two townships, and the county commissioners refuse to act upon the petition for the election until after the question of whether the township shall be divided or not shall be determined, it was held that the supreme court will not order a peremptory writ of mandamus to be issued to compel the county commissioners to order such an election until the question of the division of the township is finally settled and determined.[3]

[1] Atchison, etc., Railroad Co. *v.* Comrs. of Jefferson Co., 12 Kan. 127; State *v.* Marston, 6 Kan. 525; Cincinnati, etc., Railroad *v.* Comrs. of Clinton Co., 1 Ohio St. 77; Santa Cruz, etc., R. Co. *v.* Board, 62 Cal. 239; People *v.* Mitchell, 35 N. Y. 551; Chicago, etc., R. Co. *v.* Mallory, 101 Ill. 583; Commonwealth *v.* Comrs. of Allegheny Co., 32 Pa. St. 223; State *v.* Jennings, 48 Wis. 549; Riggs *v.* Johnson Co., 6 Wall. 166; Weber *v.* Lee Co., 6 Wall. 210; Smith *v.* Bourbon Co., 127 U. S. 105.

[2] Chalk *v.* White, 4 Wash. 156; 29 Pac. R. 979. So, where notice of the election was insufficient the writ was refused although aid had been voted. McMahon *v.* Board, 46 Cal. 214. See, also, Daniels *v.* Long, — Mich. —, 69 N. W. R. 1112.

[3] State *v.* Comrs. of Anderson Co., 28 Kan. 67; State *v.* Marston, 6 Kan. 524, and cases there cited; Atchison, etc., Railroad Co. *v.* Comrs. of Jefferson Co., 12 Kan. 136; Golden *v.* Elliott, 13 Kan. 92; State *v.* Breese, 15 Kan. 123.

§ 449. **When mandamus the remedy to enforce the levy and collection of a tax prior to judgment.**—Where there is a duty to levy and collect a special tax to pay a special class of debts, or the interest thereon, as for example, county or township refunding bonds—and there is no valid defense alleged, and no question is made as to the genuineness of the bonds or coupons, and they are owned and in the possession of a *bona fide* purchaser, the court may grant a peremptory writ of mandamus at the instance of the purchaser to compel the proper officers to levy and collect such tax prior to a judgment at law upon the bonds against the county or township.[1]

And where the amount of a debt is not disputed, nor any of the facts showing the right to have the same paid, as, when the allegations for the writ of mandamus are admitted by demurrer, and the only contention is in regard to a conclusion of law, mandamus will lie to compel the levy and collection of a tax for its payment. And a writ of mandamus to compel the payment of bonds by a town, issued under a law imposing a clear legal duty to take the necessary steps to make payment, will not be refused merely for the reason that the county clerk, town collector and county collector are not shown to have refused to extend, collect or take any steps required of them. The remedy is for a failure of a corporate body to pay and discharge its legal duty, and not for that of the individual officer. Hence, where corporate bonds are issued by a town under a law making it the duty of its proper officers to levy and collect a tax for their payment, mandamus will lie to compel the levy and collection of such tax, and its payment without a judgment against the town fixing the amount of its liabilities.[2]

[1] Riley *v.* Garfield Tp., 54 Kan. 463; Simmons *v.* Davis, 18 R. I. 46, 25 Atl. R. 691; Bailey *v.* Lawrence Co., 51 N. W. R. 331, 2 S. Dak. 533.

[2] The People *v.* Getzendaner, 137 Ill. 234; Maddox *v.* Graham, 2 Metc. (Ky.) 56; Shelby County Court *v.* Railroad Co., 8 Bush 209; Board, etc., *v.* Aspinwall, 24 How. 376; Commonwealth *v.* City of Pittsburg, 34 Pa. St. 496; Commonwealth *v.* Comrs. of Allegheny Co., 37 Pa. St. 277; State *v.* Comrs. Clinton Co., 6 Ohio St. 280; Pegram *v.* Cleveland Co., 64 N. Car. 557; Robinson *v.* Supervisors, 43 Cal. 353; Comrs. Court *v.* Rather, 48 Ala. 433; Comrs. of Sedgwick Co. *v.* Bailey, 11 Kan. 631; State *v.* Anderson Co., 8 Baxter 249; Flagg *v.* Mayor, 33 Mo. 440; People *v.* Mead, 24 N. Y. 114; Mulnix *v.* Mut. Benefit, etc., Co., 23 Colo. 81, 46 Pac. R. 127.

§ 450. **Mandamus, when not allowed to compel the levy of taxes for the payment of debts.**—But while a corporate debt remains in its original form as a simple contract debt, the creditor will, as a general rule, at least, have no legal right to a mandamus to compel the levy and collection of a tax for its payment without first having reduced the debt to a judgment, unless it was contracted under a law or vote requiring such proceeding to enforce payment. In such case the creditor has no right to any previously ascertained specific part of the general revenue, and the corporate authorities have a discretion in respect to the purpose and amount of the annual tax they may levy and collect.[1]

§ 451. **When mandamus will not lie to compel the levy of a tax to pay a judgment.**—It is not within the power of a court to compel, by mandamus, the levy of a tax to pay a judgment against a municipality where no statute makes it obligatory on such municipality to levy a tax for the purpose, and it does not appear that the judgment was based on a bond or other security issued under the statute making it obligatory to levy a tax to pay it. Thus, where the holder of a judgment against a county in the state of Colorado applied to the United States circuit court for a mandamus to compel the county to levy a tax to pay such judgment, the cause of action on which the judgment was rendered did not appear. The statute of Colorado in force when the judgment was rendered provided that, "when a judgment is rendered against the county, the same might be paid by the levy of a tax on the taxable property of the county, or by a warrant drawn upon the ordinary county fund, but the county commissioners should not be required to levy a special tax, unless, in their discretion, they should so determine." It was held by the United States circuit court of appeals that the county commissioners could not be deprived of their option to pay the judg-

[1] The People *v.* Getzander, 137 Ill. 234; The People *v.* Board, etc., of Clark Co., 50 Ill. 215; Coy *v.* City Council of Lyons, 17 Iowa 1; The People *v.* Chicago, etc., Railroad Co., 55 Ill. 95; The People *v.* Glann, 70 Ill. 232.

ment by a warrant drawn on the county fund, or of their discretion as to levying a special tax, by mandamus compelling them to levy a tax to pay the judgment.[1]

But it has been held, on the other hand, that where the municipality has an option to pay a debt either by issuing bonds or by levying a tax, a writ recognizing the option and requiring it to do one or the other would not be bad for uncertainty, and that if it has refused to issue bonds the mandate may require it to levy the tax.[2]

§ 452. **When mandamus will lie to compel municipal officers to report amount of indebtedness.**—Mandamus will lie to compel municipal officers to report the amount of the indebtedness of the municipality; but where a special meeting of the electors of a school district was held in pursuance of the written request of five residents and voters of the district, and bonds were voted, issued, and sold and the avails used by the district, it was held that on an application for a mandamus to compel the officers of the district to report the amount of the debt, the court will not inquire into the qualifications of the persons signing the request. And where a special election was held in a school district for the purpose of voting bonds to erect and furnish a school-house therein and it appeared that the election was held in good faith, in pursuance of the notice, by *bona fide* residents of the district, and the bonds having been declared carried, and thereafter issued and sold, and the proceeds used by the district, it was held that the court in a collateral proceeding will not inquire into the qualification of some of the voters at said election.[3]

[1] Board of Comrs. *v.* King, 67 Fed. R. 202, 14 C. C. A. 421.

[2] United States *v.* City of Key West, 78 Fed. R. 88. It has also been held that the merits of the case in which judgment has been rendered can not be inquired into in mandamus proceedings, and that the municipality can not, in such proceedings, interpose a set-off to the judgment. Stenberg *v.* State, 48 Neb. 299, 67 N. W. R. 190. But where the bondholder goes behind the judgment himself he can not insist that the judgment conclusively establishes the validity of the bonds. Comrs. *v.* Loague, 129 U. S. 493, citing Norton *v.* Board, 129 U. S. 479.

[3] State *v.* School District, 13 Neb. 82; County of Warren *v.* Marcy, 7 Otte 96; State *v.* School District, 10 Neb. 544.

§ 453. **Mandamus to compel county board to include certain claims in estimate.**—Where a county board in Nebraska audited and allowed certain *bona fide* claims against the county, but refused to include the same in the estimate of the taxes to be levied for the ensuing year, it was held by the supreme court of that state that mandamus would lie to compel the performance of the duty.[1]

§ 454. **When mandamus will lie to compel partial payment of municipal warrants.**—Though warrants on a county fund are payable in their order of registration, it is not necessary, where several are registered at the same time, that enough to satisfy all be accumulated before there is any payment, but, a reasonable amount being accumulated, it should be distributed among them. And a county, with power to levy a tax of five mills for county purposes, having levied only three mills for such purposes, can not refuse to apply funds to the payment of warrants which have been registered for years, on the ground that such funds are needed for the current county expenses. Hence mandamus will lie to compel the treasurer of a municipality to distribute the funds *pro rata* between the holders of the several registered warrants.[2]

So, it has been held proper to grant a peremptory writ against the state treasurer to pay a state warrant regular and on its face where there is nothing before the court to overcome the presumption that it was lawfully issued for a valid indebtedness of the state.[3]

§ 455. **When mandamus will lie to compel the registration of bonds.**—In an application for a writ of mandamus to compel the state auditor to register and certify municipal bonds under the statute in Nebraska, a writ will not issue until a strict compliance with all the requisites of the statute is shown.[4]

[1] State *v.* Wier, 33 Neb. 35; Clark *v.* Dayton, 6 Neb. 192; State *v.* Cather, 22 Neb. 792.

[2] United States *v.* Macon Co., 75 Fed. R. 259. But see, as to when a city treasurer will not be compelled to make partial payment upon a warrant which he can not pay in full. State *v.* Grant (Ore.), 49 Pac. R. 855.

[3] Mulnix *v.* Mutual Benefit, etc., Co., 23 Colo. 81, 46 Pac. R. 127. See, also, Ward *v.* Forkner (Cal.), 50 Pac. R. 713.

[4] State *v.* Babcock, 25 Neb. 500.

§ 456. **When mandamus will lie to compel payment of bonds to aid works of internal improvement.**—In an application for a mandamus to compel the payment of bonds issued to aid in the construction of works of internal improvement, it is not sufficient to show merely that they were issued "for works of internal improvement;" but there should be such particular description of the works as to enable the court to see, by an inspection of the petition alone, that they were really of that character.[1]

The statute of Nebraska provides for the payment of precinct bonds issued to aid works of internal improvement by means of special taxes to be levied and collected on all the taxable property in the precinct. In case of the failure or refusal of the proper officers to levy the necessary taxes and make the proper payment to the holder of such bonds, it is provided that they may be compelled by mandamus to do so. And this is the appropriate remedy. Thus the holder of such bonds, on which certain interest coupons had fallen due, brought an action at law thereon in the circuit court of the United States for the district of Nebraska, against the board of county commissioners of Dodge county, and obtained a judgment for the amount of the matured interest and costs. On this judgment an application was made to the supreme court for a writ of mandamus to compel the commissioners of said county to levy the necessary taxes upon the property of the precinct to pay said judgment. It was held that said judgment was an absolute nullity, and no foundation for the desired writ.[2]

§ 457. **The remedy and proceedings of bondholders in the federal courts.**—The ordinary remedy of the holder of municipal bonds in the federal courts is to sue at law and obtain a judgment to establish the validity and amount of his debt. Thereupon it is usual to issue execution. On a return of the

[1] State *v.* Thorne, 9 Neb. 458; Kemerer *v.* State, 7 Neb. 130.

[2] State *v.* Board, etc., of Dodge Co., 10 Neb. 20; State *v.* Supervisors, 20 Wis. 79; State *v.* Common Council, etc., 15 Wis. 30; People *v.* Supervisors, 8 N. Y. 317; Freemont Bldg. Asso. *v.* Sherwin, 6 Neb. 48; County Comrs. *v.* Chandler, 6 Otto 205; People *v.* Bond, 10 Cal. 570; Mayor *v.* Lord, 9 Wall. 409; State *v.* Saline County Court, 48 Mo. 390.

writ *nulla bona* or unsatisfied, application is made upon an information or on relation under oath, reciting these facts for a mandamus to compel the levy and collection of a tax to pay the judgment. But if the bondholder is by the statute expressly entitled to a levy of a special tax to pay such judgment, and if the duty of levying it has been neglected or refused, it is not necessary that an execution should in such case be returned *nulla bona*, in order to give such judgment creditor the right to a mandamus. As the course of procedure in the federal courts is in such cases assimilated to that of the common law, and is not controlled by state statutes, a demand of the respondent and a refusal must be shown, or circumstances which will dispense with the demand. When a demand is made it should be upon the corporation, or the particular officers whose duty it is, and who have the legal power to comply therewith, and the demand should be for the performance of the exact duty due to the creditor, as, for example, to levy and collect the necessary tax. It is probable that an execution issued, and a demand upon the proper officers thereunder for payment, would ordinarily be treated as a demand to levy a tax, as it would then, we think, become the duty of the officers to levy the proper tax. At all events, such an effect is in practice usually ascribed to an execution. The prudent and very cautious practitioner would accompany the writ of execution with a specific written demand to levy and collect the tax, and have it served at the same time with the writ of mandamus, the service whereof should be upon the officers upon whom the legal duty rests to do the act demanded.[1]

It must be considered as settled that the circuit courts of the United States are not authorized to issue writs of mandamus, as an original proceeding, nor at all except when necessary to the exercise of their respective jurisdiction.[2]

The writ of mandamus may be used for the purpose of enforcing a judgment rendered by the circuit court, where its use by the state court for that purpose is sanctioned by the

[1] Heine *v.* The Levee Comrs., 19 Wall. 655; Town of Queensbury *v.* Culver, 19 Wall. 83; Bath Co. *v.* Amy, 13 Wall. 244; Davenport *v.* County of Dodge, 105 U. S. 237.

[2] Bath Co. *v.* Amy, 13 Wall. 244.

state laws, but in such cases it is used as a process for the enforcement of judgments, and not as an original proceeding. In the thirteenth section of the judiciary act, the supreme court of the United States is clothed with power to issue "writs of mandamus in cases warranted by the processes and usages of law to any courts appointed or persons holding office under the authority of the United States."[1]

This express authority to issue writs of mandamus to national courts and officers has always been held to exclude authority to issue these writs to state courts and officers.[2]

The only exception is that just adverted to, where they have been issued as process to enforce judgment. The fourteenth section of the judiciary act clothes all the courts of the United States with power to issue certain specific writs, and other writs which may be necessary for the exercise of their respective jurisdictions. Of course, circuit courts may issue writs of mandamus when necessary to the exercise of their jurisdiction, said Chief Justice Waite, but they have no authority to issue it as an original writ in any case.[3]

§ 458. **The doctrine of the supreme court in the Boutwell case.**—The doctrine laid down by the supreme court in this case is that the office of a writ of mandamus against an officer is, to compel the performance of a personal duty resting upon the person to whom the writ is sent. That duty may have originated in one way or another. It may, as alleged in this case, said Mr. Justice Strong, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what fact or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus is the personal obligation of the individual to whom

[1] 1 Stat. at Large, 81.

[2] Riggs *v.* Johnson Co., 6 Wall. 166.

[3] Graham *v.* Norton, 15 Wall. 427; Riggs *v.* Johnson Co., 6 Wall. 166; United States *v.* Council of Keokuk, 6 Wall. 514; Mayor *v.* Lord, 9 Wall. 409; Clews *v.* County of Lee, 2 Woods 474; Hawley *v.* Fairbanks, 108 U. S. 543; United States *v.* Silverman, 4 Dillon 224; State *v.* City of Davenport, 12 Iowa 235; Brown *v.* Crego, 32 Iowa 498; Stevenson *v.* The District, etc., 35 Iowa 482; State *v.* Milwaukee, 20 Wis. 87; Shinbone *v.* Randolph Co., 56 Ala. 183; Commonwealth *v.* Comrs., 37 Pa. St. 277; Commonwealth *v.* Pittsburg, 34 Pa. St. 496; State *v.* Comrs. of Clinton Co., 6 Ohio St. 280.

it addresses the writ. If he be an officer, and the duty be an official one still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It can not be directed to it. It is, therefore, in substance, a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which, by him, the relator has a clear right. Hence it is an imperative rule that previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred. Thus, it is a personal default of the defendant that warrants impetration of the writ, and if a peremptory writ of mandamus be awarded, the costs must fall upon the defendant.

It necessarily follows from this, that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court can not compel the defendant to perform it after his power to perform has ceased. And if a successor in office be substituted, he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. At all events he is not a privity with his predecessor, much less is he his predecessor's personal representative. As might be expected, therefore, we find no case in which such a substitution as is asked for now has ever been allowed in the absence of some statute authorizing it.[1]

§ 459. **The doctrine in Boutwell's case not applicable to corporate duties.**—The doctrine laid down in the Boutwell case by

[1] United States *v.* Boutwell, 17 Wall. 604; The Secretary *v.* McGarrahan, 9 Wall. 298.

the supreme court of the United States that a writ of mandamus directed to a public officer abates on his death or resignation, if there be no statute to rebut that intention, does not apply to the case of duties devolved by law upon officers of a municipal or public corporation in the exercise of their corporate duties. Thus it does not apply where municipalities sought to evade their duties toward their creditors by encouraging and accepting the resignations of the officers to whom the writs of mandamus were directed or upon whom they were served, so that the particular officers upon whom the alternative writ was served would not be in office when the peremptory writ was applied for, or the officer to whom the peremptory writ was directed would resign before the writ could be served, or after the service and before the time fixed for the performance of the command, and the successor would claim that he would not be held liable, as for contempt or otherwise for the default of his predecessor.

The supreme court of the United States distinguished this class of cases from the principle enunciated in the Boutwell case and held that where the duty was to be performed by the corporation, the writ may be directed to the corporation in its corporate name, or to the proper officers in their corporate capacity in their official style without naming them, and that when it is once duly served its power remains, notwithstanding changes in the officers by death, resignation or otherwise, until the duty which is commanded is performed, and that the officers in existence at the time that the act is to be performed will be the parties to whom the court will look for the performance of what is demanded. As the corporation can not die or retire from the office it holds, the writ can not abate as it did in the Boutwell case.[1]

§ 460. **The effect of the resignation of public officers to avoid payment of judgment.**—By the common law, as well as by the statutes of the United States, when the term of office to which one is elected expires, his power to perform its duties

[1] Commissioners *v.* Sellew, 99 U. S. enberg County Court, 120 U. S. 354, 624. See, also, Meriwether *v.* Muhl- 7 Sup. Ct. R.

ceases. For example, the term of office of the district attorney of the United States, for a particular state, is fixed by statute at four years. When this four years expires, his right or power to perform the duties of the office is at an end, as completely as if he had never held the office.[1]

So, a judge of the court of appeals of the state of New York, or a justice of the supreme court, is elected for a term of fourteen years, and takes his seat on the first day of January following his election. When the fourteenth January thereafter is reached, he ceases to be a judicial officer, and can perform no one duty pertaining to the office. Whether a successor has been elected, or whether he has qualified, does not enter into the question.[2]

This is the general rule. But where a statute in relation to a public or municipal officer provides that such officer shall continue in office until his successor is qualified, a resignation made in order to avoid auditing or paying a judgment against the municipality is not a sufficient return to an alternative mandamus to compel such officers to make such audit and payment.

§ 461. **The same subject—Illustrations.**—Thus the constitution of Illinois contains a provision that, "town officers, except as otherwise provided, shall hold office for one year, and until others are elected or appointed in their places and are qualified." The supreme court of the United States, in construing this provision of the Illinois constitution, held that a resignation does not relieve a supervisor or town clerk from the responsibilities of his office, until a successor is appointed. Mr. Justice Hunt, in delivering the opinion of the court, said: "The provision, as to these officers and as to the town officers, are parts of the system. The resignations may be made to and accepted by the officers named; but to become perfect, they depend upon and must be followed by an additional fact, to wit: the appointment of a successor, and his qualification. It is said in the statute that the resignation may thus be ac-

[1] United States Revised Stat., § 769. 599; People *v.* Tileman, 8 Abb. Pr.
[2] Badger *v.* United States, 93 U. S. 359, 30 Barb. 193.

cepted, it is like to the expiration of the term of office. In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor."[1]

Judge Blodgett, in the court below, in considering this question enunciated the same doctrine; that is, that a resignation does not relieve a supervisor or town clerk from the responsibilities of his office until his successor is appointed.[2]

In New York it was held that when a person sets up a title to property by virtue of an office, and comes into court to recover it, he must show an unquestionable right. It is not enough that he is an officer *de facto*, that he merely acts in the office; but he must be an officer *de jure*, and have a right to act. So, we think, where a person, being in an office, seeks to prevent the performance of its duties to a creditor of the town, by a hasty resignation, he must see that he resigns *de facto*, not only, but *de jure*; that he resigns his office, not only, but that a successor is appointed. An attempt to create a vacancy at a time when such action is fatal to the creditor will not be helped out by the aid of the courts.[3]

§ 462. **The doctrine in Michigan.**—The statute of Michigan prescribes as to the term of office of township officers, except justices, commissioners of highways and school inspectors, that each shall hold his office for one year, and until his successor shall be elected and qualified.

The statute also provides that "every office shall become vacant on the happening of either of the following events before the expiration of the term of such office:

"First, the death of the incumbent.

"Second, his resignation.

"Third, his removal from office," etc.

But it is nowhere declared in the language of the statute when a resignation shall become complete. This is left to be determined upon general principles. And in view of the

[1] Badger *v.* United States, 93 U. S. 599.

[2] United States *v.* Badger, 6 Bissell 308.

[3] People *v.* Hopson, 1 Den. 574; People *v.* Nostrand, 46 N. Y. 375.

manifest spirit and intent of the laws above cited, it seems to us, says Mr. Justice Bradley, that the common law requirement, namely, that a resignation must be accepted before it can be regarded as complete, was not intended to be abrogated. To hold it to be abrogated would enable every office-holder to throw off his official character at will, and leave the community unprotected. We do not think that this was the intent of the law.

A municipal officer, therefore, who tenders his resignation, does not cease to be such officer, until his resignation has been accepted. And a return to a mandamus requiring a supervisor of a municipality to take proper steps to levy a tax to pay a judgment against a municipality, that he had delivered to and filed with the clerk his resignation of such office of supervisor, did not sufficiently show that the defendant had ceased to be a supervisor of the municipality.[1]

§ 463. **The Michigan doctrine qualified.**—The doctrine stated in the preceding section has been qualified by the supreme court in cases where, by statute, an officer has the right to resign at will, and the statute provides that the resignation shall take effect as soon as it is filed with the proper officer of the municipality. Thus, under the statute of Wisconsin, service of process upon cities must be made "by delivering a copy thereof to the mayor and city clerk." The charter of the city of Watertown required service of summons to be on the mayor of the city. It appeared that in an action upon a debt, and when the summons against the city was issued, there was no mayor or acting mayor of the city, his resignation having taken effect. Service of summons was made upon the last mayor, the city clerk, the city attorney, and the last presiding officer of the board of street commissioners, the return reciting that the office of mayor was vacant and that there was no president of the common council or presiding officer thereof in office. The supreme court of the United States held that where the charter of a city required service of summons to be on the mayor of the city, and there was no mayor in office, service on the last

[1] Edwards *v.* United States, 103 U. S. 471.

mayor, who has resigned and whose resignation has taken effect, is not sufficient. And a charter of a city which provides that its officers shall hold their offices until their successors are elected and qualified, does not apply in case of resignation, especially where the law applicable to the city provides for their resignation. Where a particular method of serving process is pointed out by statute, that method must be followed; and this rule is especially exacting in reference to corporations, and where the statute designates a particular officer upon whom process may be served, no other officer or person can be substituted.[1]

§ 464. **Limitations upon the power to compel the levy of taxes to pay bonded indebtedness.**—Where a bonded indebtedness was authorized, and the power of taxation for its payment was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter, by general or special acts, be permitted, no contract was impaired by taking away a power which was in force when the bonds were issued. Every purchaser of municipal bonds is chargeable with notice of the statute under which the bonds were issued. If the statute gives no power to make the bonds, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay bonds, the holder can not require the municipal authorities to levy a tax for that purpose. The courts have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. The court can not create new rights or confer new powers. All it can do is to bring existing powers into operation.[2]

But the supreme court of the United States has held that, when in order to construct a public work, a municipal corporation has been vested with authority to borrow money or in-

[1] Amy *v.* Watertown, 130 U. S. 301; Salamanca Township *v.* Wilson, 109 U. S. 627; Edwards *v.* United States, 103 U. S. 471; Badger *v.* United States, 93 U. S. 599.

[2] United States *v.* County of Macon, 99 U. S. 582.

cur obligation it has the power to levy a tax for its payment, without any special mention that such power has been granted. The power of taxation belongs exclusively to the legislative branch of the government, but may be delegated by the legislature to municipal corporations. And when a municipal corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited.[1]

But the limit on taxation imposed by a city's charter can not be made to apply to an indebtedness created prior to its passage, when accompanied with power in the city, at the time it was created, to impose taxation, sufficient to discharge it.[2]

§ 465. **Remedy of bondholder to enforce the collection of taxes to pay judgment in the federal courts.**—Where municipal authorities have refused to levy a tax to pay a judgment against a municipality, the appropriate remedy is by a writ of mandamus. There is no authority in such cases for the substitution of a bill in equity and injunction for the writ of mandamus.[3]

In a later case the court reasserted the doctrine that the appropriate remedy of a creditor is the writ of mandamus; and declared that in legal contemplation, judged by its nature and ordinary results, and not by its failure in exceptional cases, it afforded an adequate remedy, and that the difficulty of its execution in a particular instance afforded no sufficient ground for equitable jurisdiction. Where the writ of mandamus is unavailing the court has no authority to appoint its own officers to execute the duty of levying a tax when it is neglected by the municipal authorities. And a debt against the municipality can not be collected by a remedy which is in direct violation of the statute when the debt was incurred and made known to the creditor with the same solemnity as the statute which gave power to contract the debt. A court of equity can not, by avowing that there is a right but no remedy known to the

[1] United States *v.* New Orleans, 98 U. S. 381; Ralls Co. Ct. *v.* United States, 105 U. S. 733.

[2] Quincy *v.* Jackson, 113 U. S. 332.

[3] Walkley *v.* City of Muscatine, 6 Wall. 481.

law, create a remedy in violation of law, or without the authority of law.[1]

The proposition that the levy and collection of taxes, though they are to be raised for the satisfaction of judgments against municipalities, was not within the jurisdiction of a court of equity was reviewed and fully considered in an able opinion by Mr. Justice Miller in the case of Thompson *v.* Allen County.

In this case the court held that the fact that the remedy at law by a mandamus had proved ineffectual and that no officers could be found to perform the duty of levying and collecting the taxes, was not sufficient ground of equity jurisdiction. The principle was the same where the proper officers of the municipality had levied the tax and no one could be found to accept the office of collector of taxes. This gave no jurisdiction to a court of equity to fill that office or to appoint a receiver to perform its functions. The inadequacy of the remedy at law, which sometimes justifies the interference of a court of equity, does not consist merely in its failure to produce the money, a misfortune often attendant upon all remedies, but that in its nature or character it is not fitted or adapted to the end in view; for in this sense, the remedy at law is adequate, as much so, at least, as any remedy which chancery can give.[2]

A proceeding by mandamus to compel the levy of a tax to pay a judgment is in the nature of an execution. The rights of the parties to the judgment, in respect of its subject-matter, were fixed by its being rendered.[3]

§ 466. **A judgment creditor is not entitled to mandamus to compel the levy or collection of tax to pay bonds under an abrogated statute.**—It is a well settled doctrine in the supreme court of the United States that mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the

[1] Rees *v.* City of Watertown, 19 Wall. 107; Heine *v.* Levee Comrs., 19 Wall. 655; Board of Comrs. *v.* King, 67 Fed. R. 202, 205.

[2] Thompson *v.* Allen Co., 115 U. S. 550. But see Garrett *v.* City of Memphis, 5 Fed. R. 860; 2 Elliott R. R., § 918; Supervisor *v.* Rogers, 7 Wall. 175.

[3] Chanute City *v.* Trader, 132 U. S. 210.

power to perform the act. Thus the city of Brownsville issued bonds, under an act of the legislature of February 8, 1870, for the purpose of paying for stock in aid of a railroad. The power and authority to issue the bonds and levy a tax to pay interest thereon, upon which the relator's suit was founded, was given to the city by the act of February 8, 1870, by the legislature of Tennessee, but before the contract was completed or the election under the act of 1870, held by Brownsville, or the bonds issued, the act of 1870 was repealed and abrogated by the constitution of the state of Tennessee, which went into effect May 5, 1870. A bondholder had recovered judgment on such bonds, and in 1886, sought to enforce the levy and collection of a tax under the act of 1870 to pay the judgment. The circuit court of the United States for the western district of Tennessee held that, although the act of February 28, 1870, was abrogated by the state constitution and the bonds were therefore void, yet judgment upon the coupons conclusively established the validity of the bonds. And so, also, the validity of the legislature giving the remedy by a levy of taxes for their payment. The case was appealed to the supreme court of the United States and the judgment of the circuit court was reversed on the ground that the judgment upon the coupons did not estop the municipality from showing that it had no legal power to levy the tax by reason of the abrogation of the act of 1870, under which the bonds were issued, and which was the only source of authority to levy tax for their payment. Chief-Justice Fuller, speaking for the court, said: "But in the case at bar it appeared from the judgment records, or if not, from relator's petition, that the bonds were issued under an abrogated statute, and were consequently void, and that the respondents possessed no power to tax to pay them, because that power was given only by the statute which had so ceased to exist. The power invoked is not the power to tax to pay judgments, but the power to tax to pay bonds, considered as distinct and independent, and therefore, when the relator is obliged to go behind his judgment as money judgments merely to obtain the remedy pertaining to the bonds, the court can not decline to take cognizance of the fact that the bonds are utterly

void, and that no such remedy exists. *Res adjudicata* may render straight that which is crooked, and black that which is white. *Facit ex curvo rectum ex albo nigrum.*[1] But where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever."[2]

§ 467. **When mandamus will not lie to apportion or determine the equities between bondholders.**—When a court refuses to levy a tax required by law to be levied for the payment of bonds, mandamus will lie to compel such levy. But where bonds maturing in different years were issued for the improvement of certain lands upon which they were made a lien until paid, and the law required the court to levy enough taxes upon such lands each year to pay the annual interest on such bonds and all bonds maturing the following year, allowing at least twenty-five per cent. for delinquent taxes, and the court only levied enough, if all collected, to pay the interest and bonds, and allowed nothing for delinquencies, and delinquent suits were instituted and certain tracts sold under judgment, and some of the purchasers were *bona fide* holders, it was held by the United States circuit court for the eastern district of Missouri, that the court can not attempt in a mandamus proceeding, to apportion or determine the equities which exist, and will not issue mandamus to compel the second levy upon lands sold for the payment of bonds due before such sales were made.[3]

§ 468. **The distinction between municipal bonds and warrants as to mode of enforcement.**—The distinction between these two classes of municipal securities often becomes important when it is sought to enforce payment by means of manda-

[1] Jeter *v.* Hewitt, 22 How. 352.

[2] Brownsville *v.* Logue, 129 U. S. R. 603.

[3] Shelley *v.* St. Charles Co., 30 Fed. 493.

mus. Municipal warrants not being commercial paper, but being in the nature of vouchers to the creditor of the municipality, and in the form of warrants or orders for his convenience, such instruments are as a rule paid in the manner provided by statute or the charter of the municipality. Most of the states provide that such warrants must be paid in the order of registration. When the statute prescribes that they must be paid in that order, it must be strictly followed.

Judge Dillon, in considering this question, says: "Where such warrants or orders have been issued by a corporate or *quasi*-corporation capable of being sued in the state court, the federal courts, so far as our observation goes, have held that the non-resident owner thereof may also sue thereon in the federal court, and by its judgment establish the validity on the amount of its debt, and such judgment may become the basis of an application made in due form for the writ of mandamus; but the writ, when so issued, will only command the proper officers to discharge the legal duties they owe, under the charter or statute, to the warrant holder. The federal courts can not overturn or interfere with the policy of the state in respect to the rights or remedies of this class of creditors."[1]

§ 469. **Illustration.**—Thus, counties in Iowa are authorized to issue, for ordinary expenses, orders or warrants, payable to bearer, and are liable to be sued upon them. The statute limited the power of the county authorities "for ordinary county revenues" to levy each year of "not more than four mills on the dollar," and made no provision for the levy of a special tax to pay the judgments obtained on such warrants. Suit was brought by a non-resident holder of warrants in the circuit court of the United States for the District of Iowa, and a judgment was obtained against the county. The judgment was for the amount due upon sundry county warrants, issued

[1] 2 Dillon on Mun. Corp., § 863; Jordan *v.* Case Co., 3 Dillon C. C. 185. That warrants may be sued on and that mandamus is not the exclusive remedy, see Goldsmith *v.* City of Baker City (Ore.), 49 Pac. R. 973; Frankl *v.* Bailey (Ore.), 50 Pac. R. 186, 188; City of Connersville *v.* Connersville, etc., Co., 86 Ind. 184.

for the ordinary expenditures of the county. An execution having been awarded upon the judgment and returned "*nulla bona*" the relator sued out a writ of mandamus to compel the board of supervisors of the county to levy a specific tax sufficient to pay the debt, interest and costs, and to apply the same, when collected, to the payment. To this writ the supervisors returned in substance, averring that the judgment had been obtained upon ordinary county warrants issued for the ordinary expenditures of the county, that they had levied a county tax for the current year at four mills on the dollar of the taxable property of the county and that they proposed to levy a similar tax for each succeeding year until the judgment should be paid. They further returned that they had no power to levy a tax at any higher rate. A general demurrer to this return was then interposed, which the circuit court sustained, and the writ of mandamus was accordingly awarded. The case was appealed to the supreme court of the United States and the decision of the circuit court was reversed on the ground that mandamus will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the laws of the state from which they derive their powers. And it was not the duty of the board of supervisors of a county in the state of Iowa to levy a special tax, in addition to a county tax of four mills upon the dollar to satisfy a judgment recovered against the county for its ordinary indebtedness under the statutes of the state.[1]

§ 470. **When mandamus will lie to compel the payment of claims and warrants against a municipality.**—Where a statute provides that the amount due to jurors and bailiffs shall be paid by the county treasurer upon the certificate of the district or county court in which such services were rendered, and where another statute provides that such certificates shall be transferrable by delivery, it has been held that, it not being the duty of the clerk to pass upon the validity of a transfer by a juror or bailiff of such a claim against the county, the clerk could not be compelled by mandamus to issue to an assignee

[1] Supervisors *v.* United States, 18 Wall. 71.

of such claim the certificate designated in the statute, although evidencing only the right of the assignor to compensation.[1]

A peremptory writ of mandamus will not issue to compel a board of town auditors to audit a claim of a commissioner of highways for a judgment for legal services recovered against him and paid by him in that capacity, where the record and pleadings failed to show that the services in question were necessary and proper, and that the board had passed upon the same.[2]

So, where there is no money in the treasury of a municipal corporation for the payment of warrants, a mandamus to its governing board to draw a warrant upon its treasurer may be denied.[3]

But where the county commissioners refuse to pay a claim when there are funds in the county treasurer liable thereto, the remedy is mandamus, and not by action for damages against them personally.[4]

A peremptory writ of mandamus will issue to compel the comptroller of a city to countersign a teacher's warrant in payment of the teacher's services for the month, where the board of commissioners have contracted with the teacher for a year, beginning at a stated period, "provided there be sufficient money properly set apart to pay for that period, and if there be not sufficient money for that purpose, for such portion of that period as the money so set apart shall be sufficient," there being money in the treasury of the city appropriated for the payment of salaries of school teachers.[5]

An application for a writ of mandamus to compel the payment of county warrants, and information showing that the relator

[1] Pace *v.* Ortiz, 72 Tex. 437, 10 S. W. R. 541. See Watkins *v.* State (Ind.), 49 N. E. R. 169.

[2] People *v.* Case, 19 N. Y. Supp. 625.

[3] Board of Improvement *v.* McManus, 54 Ark. 446; People *v.* Tremain, 17 How. P. R. 142; Commonwealth *v.* Comrs., 6 Bin. (Pa.) 5; Clay Co. *v.* McAleer, 115 U. S. 616. See, also, State *v.* Sheldon (Neb.), 73 N. W. R. 694.

[4] Hunter *v.* Mobley, 26 S. Car. 192, 1 S. E. R. 670.

[5] People *v.* Coffey, 131 N. Y. 569, 35 N. E. R. 34, 62 Hun 86, 16 N. Y. Supp. 501. See, also, State *v.* Born (Wis.), 73 N. W. R. 105; Manor *v.* State 149 Ind. 310, 49 N. E. R. 160; Rice *v.* Gwinn (Idaho), 49 Pac. R. 412.

has valid warrants against the general funds of the county, and that the treasurer holds funds which appear to be applicable to their payment, is sufficient to require the treasurer to show cause why such funds should not be so applied.[1]

While the remedy by mandamus rests largely in the discretion of the court, yet the rule is uniform and inflexible that the writ will not be granted unless the relator's right to it is clearly established. As a general rule, mandamus will lie to compel a county treasurer, or other public disbursing officer, to pay an order legally drawn upon funds in his hands, subject to the payment of the same, and this, though he has, through inadvertence or mistake, paid the amount to one not entitled to be paid. But when, by reason of a complication of extraneous circumstances, not specifically provided for by the statute, a well founded doubt arises, either as to the right of the applicant to receive the fund or the duty of the officer to pay it out, mandamus is not the proper remedy. The right in such case being doubtful, the claimant must resort to some other appropriate remedy to determine it.[2]

Remedies by Injunction.

§ 471. **Mandamus and injunction distinguished.**—These are, in their nature, different remedies, and in general are not concurrent or interchangeable. Mandamus is essentially and exclusively a common law remedy, and is unknown to the equity practice. But if this were otherwise, it seems to be the well-settled doctrine of the supreme court of the United States that the circuit courts can not use the writ of mandamus as an original and independent remedy, but are limited to its use as a process in the enforcement of rights when jurisdiction has been already acquired for other purposes. In fact, in the class

[1] United States *v.* County of Clark, 96 U. S. 211; Knox County Court *v.* United States, 109 U. S. 229.

[2] People *v.* Johnson, 100 Ill. 537; People *v.* Smith, 43 Ill. 219; People *v.* Dulaney, 96 Ill. 503; People *v.* Klokke, 92 Ill. 134; People *v.* Davis, 93 Ill. 133; Simmons *v.* Davis, 18 R. I. 46, 25 Atl. R. 691; Frankl *v.* Bailey (Ore.), 50 Pac. R. 186; State *v.* La Grave, 22 Nev. 417, 41 Pac. R. 115. See, generally, Ray *v.* Wilson, 29 Fla. 342, 14 L. R. A. 773, and note.

of cases in which it is here sought, it is a writ in execution of the judgment of the court already rendered, and can only be used because it is an appropriate process for that purpose.[1]

The office of the writ of mandamus is to compel a corporation or a public officer to perform some particular corporate official act or duty incumbent upon it or him, which is imperative in its nature, and to the performance of which the relator has a clear legal right. Mandamus, where it is the appropriate remedy, will be awarded against a municipality or its officers whenever they refuse or unreasonably neglect to perform any duty clearly incumbent upon them by the statute, and where there is no ordinary or adequate remedy to enforce the right of the public, or the particular legal right of the relator, but there can be no jurisdiction in equity to enforce the payment of municipal bonds, until the remedy at law has been exhausted.[2]

A writ of injunction belongs solely to a court of equity, and, as a rule, is issued to prevent the doing of some specific act. Where the officers of a municipality refuse to levy a tax to pay a judgment against a municipality the appropriate remedy is by a writ of mandamus.[3]

And where bonds have been voted by a county to pay for a stock of subscription to a railway company, the legal obligation is to issue the bonds pursuant to the vote. And if the county officials refuse or neglect to issue the bonds, the appropriate remedy is by mandamus to compel the proper officers of the county to issue the bonds. The railroad company, or, if it be solvent, a judgment creditor of the company can not maintain a bill in equity to compel the issue and delivery of the bonds to be applied on the judgment. The right to proceed against the county is a purely legal right, and can only be prosecuted at law, notwithstanding the equitable nature of the complainant's right as against the railroad company.[4]

[1] McIntire *v.* Wood, 7 Cranch 504; McClung *v.* Silliman, 6 Wheat. 601; Kendall *v.* United States, 12 Pet. 527; Riggs *v.* Johnson Co., 6 Wall. 166; Secretary *v.* McGarrahan, 9 Wall. 298; Bath Co. *v.* Amy, 13 Wall. 244.

[2] Heine *v.* The Board of Levee Comrs., 19 Wall. 655.

[3] Walkley *v.* City of Muscatine, 6 Wall. 481.

[4] Smith *v.* Bourbon Co., 127 U. S. 105; Walkley *v.* Muscatine, 6 Wall.

§ 472. **Injunction, when granted to restrain issue of bonds.** —Where an action is commenced under the provisions of the Kansas statutes, to contest the validity of an election held in a county to vote upon the proposition to issue the bonds of the county for the purpose of erecting permanent county buildings at the county seat, and also to enjoin the county commissioners from issuing or negotiating any bonds, the plaintiff is not entitled, on filing his verified petition, as a matter of right, to have a temporary injunction granted, restraining the issue of bonds until the contest can be tried and determined. In such a case, if the court or judge to whom the application is made for the temporary injunction is satisfied that there is a *bona fide* controversy over the question whether the proposition to issue the bonds has been carried, and sufficient votes cast in favor of the proposition are seriously challenged to change the result, and upon the hearing of the application there is great conflict in the affidavits offered, it would be best for the court or judge, as a general rule, to grant the temporary injunction, so that the real facts of the case may be ascertained on the final hearing, upon oral or other competent evidence, as the truth of a petition can not be satisfactorily determined upon conflicting affidavits merely; but the granting or refusing of the temporary injunction rests largely in the sound judicial discretion of the court or judge to whom the application is made.[1]

§ 473. **Injunction, when not granted to restrain the issue of bonds.**—A perpetual injunction will not be granted on the final trial against a city, to restrain its officers from issuing, selling and delivering its bonds in aid of local improvements, when there is an express finding by the trial court that said

481; Heine *v.* The Board of Levee Comrs., 19 Wall. 655; Rees *v.* City of Watertown, 19 Wall. 107; Raton Water Works Co. *v.* Town of Raton (N. Mex.), 49 Pac. R. 898. But see Massachusetts, etc., Co. *v.* Township of Cherokee, 42 Fed. R. 750.

[1] Johnson *v.* Comrs. of Wilson Co., 31 Kan. 670; Foster *v.* Scarff, 15 Ohio St. 532; Dishon *v.* Smith, 10 Iowa 212; People *v.* Hartwell, 12 Mich. 508; Stoddart *v.* Vanlaningham, 14 Kan. 18; Akin *v.* Davis, 14 Kan. 143; Conley *v.* Fleming, 14 Kan. 381; Wood *v.* Millspaugh, 15 Kan. 14.

bonds had been issued, sold and delivered before service of a temporary restraining order issued at the commencement of the action.[1]

The fact that an act authorizes the issue of bonds for the purpose of supplying municipal corporations and their citizens with natural gas does not render it unconstitutional, as an exercise of the power of taxation for a private purpose. Hence, an injunction will not lie against the issuing of such bonds on the ground that taxation will have to be resorted to for their payment, when the act provides that the revenue derived from the sale of gas is to be applied to the payment of the principal and interest of said bonds.[2]

§ 474. **Injunction will lie to restrain a municipality from creating a debt in excess of the constitutional limit.**—A municipality being indebted to an amount equal to two per cent of its taxable property is, under the constitution of Indiana, prohibited from issuing an order on its treasury even for current expenses, where there are no funds in the treasury which may be applied to its payment, and may be enjoined from issuing such an order when one is about to be issued and no provision has been made for its payment.[3]

A tax-payer may maintain a suit to enjoin the municipality from issuing bonds in excess of the constitutional limit, or from levying or collecting a tax for the purpose of paying the indebtedness incurred.[4]

[1] City of Alma *v.* Loehr, 42 Kan. 368; Menard *v.* Hood, 68 Ill. 121.

[2] Fellows *v.* Walker, 39 Fed. R. 651; Walker *v.* Cincinnati, 20 Ohio St. 14; Hamilton Gas-Light, etc., Co. *v.* City of Hamilton, 37 Fed. R. 832; Sharpless *v.* The Mayor, etc., 21 Pa. St. 147; Loan Association *v.* Topeka, 20 Wall. 655.

[3] Sackett *v.* City of New Albany, 88 Ind. 473; City of Springfield *v.* Edwards, 84 Ill. 626; Prince *v.* City of Quincy, 105 Ill. 138; Grant *v.* City of Davenport, 36 Iowa 396; French *v.* City of Burlington, 42 Iowa 614; Dively *v.* City of Cedar Falls, 27 Iowa 227; Scott *v.* City of Davenport, 34 Iowa 208; National State Bank *v.* Ind. Dist., 39 Iowa 490; McPherson *v.* Foster, 43 Iowa 48; Mosher *v.* Ind. School Dist., 44 Iowa 122; City of Council Bluffs *v.* Stewart, 51 Iowa 385.

[4] Hunt *v.* Fawcett, 8 Wash. 396, 36 Pac. R. 318; Avery *v.* Job, 25 Ore. 512, 36 Pac. R. 293; Wilkinson *v.* Van Orman, 70 Iowa 230; Howell *v.* City of Peoria, 90 Ill. 104; Spilman *v.* City of Parkersburg, 35 West Va. 605, 14 S. E. R. 279.

And it has been held in Iowa that if an action is brought against the municipal authorities to compel them to levy taxes for the payment of an indebtedness in excess of the constitutional limit, a tax-payer has the right to intervene and defend if the municipal authorities refuse to set up a defense.[1]

Where a city has already reached the limit of indebtedness prescribed by its charter, and its council has passed an ordinance confirming a contract for public works, which may render it liable at any time for the payment of an additional annual sum equal to three-fourths of the limit of its indebtedness as fixed by its charter, and directing that warrants shall be issued to pay such sum, an injunction restraining the city council from carrying out the contract can not be considered as improperly and prematurely issued.[2]

§ 475. **When part of the debt is valid and part invalid.**—A tax can not be levied to pay a municipal debt forbidden by the constitution, but when the tax levied is only in part to pay such a debt, and the residue for a lawful purpose, only the illegal part will be enjoined. The tax levied within the limit of the lawful power of the body imposing it will be sustained, when it can be separated from the portion that is illegal.[3]

§ 476. **Municipal bonds irregularly issued may be enjoined.**—In an action to enjoin the issuing of certain bonds of a city, to be donated to a railway company upon completion of its road, it appeared that the whole question had not been submitted or adopted for the payment of the principal at any time. It was held by the supreme court of Nebraska that the injunction granted by the court below would be affirmed. It was thereafter held that a much stronger case is required to enjoin the collection of taxes levied for the payment of interest on municipal bonds issued in pursuance of apparent authority, and which have been duly registered and passed into the hands

[1] Richards *v.* Supervisors of Lyon Co., 69 Iowa 612.

[2] Davenport *v.* Kleinschmidt, 6 Mon. 502, 13 Pac. R. 249.

[3] Culbertson *v.* City of Fulton, 127 Ill. 30.

of *bona fide* purchasers, than to prevent the issuing of such bonds upon specified grounds which might invalidate them.[1]

§ 477. **When injunction will lie to restrain the diversion of the proceeds of bonds.**—A municipal corporation, under an ordinance authorized by its charter, issued some bonds to provide a fund for building a market-house. By the terms of the bonds the revenue of the market was to be devoted to the payment of the interest on the bonds and to form a sinking fund to redeem them. After the issuance of the bonds the corporation obtained a new charter, authorized by which they devoted the revenue of the market to other purposes than that provided for by the ordinance authorizing the bonds. A holder of some of these bonds brought a bill in equity to compel specific performance, and asked for an injunction to prevent further diversion of the market-house revenues. The facts having been admitted by the respondents, an injunction was allowed as prayed for.[2]

§ 478. **Laches a defense to an action on voidable bonds.**—A proposition to issue county bonds to aid in the construction of a railroad "to issue and give to the Lincoln & Northwestern Railroad Company, or the Blue Valley & Northwestern Railway Company, one hundred thousand dollars of the coupon bonds of said Platte county," etc., was submitted to the voters of Platte county, Nebraska, and adopted by the requisite majority and the bonds issued, duly certified, and delivered to the Lincoln & Northwestern Railroad Company, which built the proposed railroad. It was held that while the issuing and delivering of bonds voted under an alternative proposition would be enjoined if timely application was made for that purpose,

[1] Cook *v.* City of Beatrice, 32 Neb. 80. See, also, Elyria Gas, etc., Co. *v.* City of Elyria (Ohio), 49 N. E. R. 335.

[2] Fazende *v.* City of Houston, 34 Fed. R. 95; Maenhaut *v.* City of New Orleans, 2 Woods 108. See, also, Blood *v.* Manchester, etc., Co. (N. H.), 39 Atl. R. 335; Chamberlain *v.* City of Tampa (Fla.), 23 So. Rep. 572. So, a county may have the assistance of a court of equity to restrain its treasurer from wrongfully applying funds in his hands to the payment of void bonds. Missouri River, etc., R. Co. *v.* Miami County, 12 Kan. 230. See, also, Township of Midland *v.* County Board, 37 Neb. 582, 56 N. W. R. 317.

yet as by the terms of the proposition the commissioners were authorized to issue and deliver the bonds to the one of the companies named which should build the road, and having complied with such apparent authority, their action in the premises was voidable and not void. In other words, the bonds were liable to be set aside at any time before they were duly certified and had passed into the hands of an innocent purchaser for value. But when there has been great delay in bringing an action relief may be denied where, had the application been seasonably made, it would have been granted.

§ 479. **When tax-payer may enjoin the issuance of municipal securities.**—A tax-payer may maintain an injunction to prevent the issuance of corporate bonds without authority. There is no other remedy of equal power and efficiency.[2]

The tax-payer has sufficient interest to enable him to maintain a suit to enjoin the municipal authorities from entering into a contract which will create an indebtedness in excess of the constitutional limit. But, it has been held, that in order to entitle a tax-payer to maintain such action, it must be shown that he would sustain injury by the contemplated action of the municipality.[3]

An injunction lies at the suit of a tax-payer of the proper county to restrain the issuance by the county clerk of a warrant on the county treasurer for an illegal or unauthorized purpose, and to enjoin the payment of such warrant by the county treasurer.[4]

[1] North *v.* Platte Co., 29 Neb. 447; Jones *v.* Hurlburt, 13 Neb. 125; Spurck *v.* L. & N. W. R. Co., 14 Neb. 293; State *v.* Roggen, 22 Neb. 118; Marsh *v.* Fulton Co., 10 Wall. 676; Township of East Oakland *v.* Skinner, 94 U. S. 255; Lewis *v.* City of Shreveport, 108 U. S. 282; Reineman *v.* C. C. & B. H. R. R. Co., 7 Neb. 310; Hamlin *v.* Meadville, 6 Neb. 227; Ogden *v.* County of Davis, 102 U. S. 631; Dickinson Co. *v.* Field, 111 U. S. 83.

[2] Town of Winamac *v.* Huddleson, 132 Ind. 217; Denny *v.* Denny, 113 Ind. 22; Bishop *v.* Moorman, 98 Ind. 1; Watson *v.* Sutherland, 5 Wall. 74; Elyria Gas, etc., Co. *v.* City of Elyria (Ohio), 49 N. E. R. 335.

[3] City of Springfield *v.* Edwards, 84 Ill. 626; Valparaiso *v.* Gardner, 97 Ind. 1.

[4] Ackerman *v.* Thummel, 40 Neb. 95; Normand *v.* Board, etc., of Otoe Co., 8 Neb. 18; Whitcomb *v.* Reed, 24 Neb. 50; Brownfield *v.* Houser, 30 Ore. 534, 49 Pac. R. 843.

§ 480. **When injunction will not be maintained by a private individual.**—Where a private individual brought an action in the name of the state on his relation, to perpetually enjoin a canvassing board from canvassing the election returns of an election held to authorize a subscription to the capital stock of a railroad company, and to issue bonds in payment therefor, and such private individual had no interest in the subject-matter of the action different in kind from that of the public in general, it was held that the action could not be maintained, although the relator may be a resident, a tax-payer and an elector.

It was further held, that in such an action, where a temporary injunction had been granted, the court did not err in dissolving the temporary injunction and in dismissing the action.[1]

But the general rule is that a resident tax-payer, although he shows no special private interest, may invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the municipality, or the illegal creation of a debt which he, in common with other property owners, may otherwise be compelled to pay.[2]

Where a city, without authority of law, caused a tax to be levied and extended upon the tax roll, for the purpose of creating a fund with which to pay certain bonds theretofore issued and delivered, in payment for bridges that had been built therein, and after the tax roll had come to the hands of the county treasurer for the collection of the taxes, a number of tax-payers of the city voluntarily paid the illegal tax thus levied, it was held that the public has no such interest in the money thus paid as will authorize the state to interfere, and to maintain an action in the name of the state enjoining the treasurer from paying out the money so received by him, and from disbursing it in accordance with the will of those who paid the same.[3]

[1] State *v.* Board, etc., of Wabaunsee Co., 36 Kan. 180; Nixon *v.* School District, 32 Kan. 510. See, also, Wood *v.* Bangs, 1 Dak. 179, 46 N. W. R. 586.

[2] Crampton *v.* Zabriskie, 101 U. S. 601; Tukey *v.* City of Omaha (Neb.), 74 N. W. R. 613; Chamberlain *v.* City of Tampa (Fla.), 23 So. R. 572; 1 Beach on Pub. Corp., §§631, 632.

[3] City of Atchison *v.* State, 34 Kan. 379; State *v.* McLaughlin, 15 Kan. 228; Hudson *v.* Comrs. of Atchison Co., 12 Kan. 140; Ewing *v.* Board, etc., of Jefferson City, 72 Mo. 436.

Remedies in Equity.

§ 481. **Proceedings in equity.**—In general it is only necessary before proceeding by mandamus that the amount of the demand shall be conclusively fixed and determined, and that it is the present duty of the municipality to provide for its payment.[1]

But the supreme court of the United States has held that equity jurisdiction should not be exercised to compel the payment of a judgment in favor of a bondholder which the writ of mandamus had failed to enforce, since the court regarded mandamus as the regular and appropriate remedy.[2]

§ 482. **When a court of equity has no jurisdiction.**—There can be no jurisdiction in equity to enforce the payment of municipal bonds until the remedy at law has been exhausted. Where the law has provided that a tax shall be levied to pay such bonds, a mandamus after judgment to compel the levy of the tax, in the nature of an execution or process to enforce the judgment, is the only remedy. The fact that this remedy has been shown to be unavailing does not confer upon a court of equity the power to levy and collect taxes to pay the debt. The power to levy and collect taxes is a legislative function in this country, and does not belong to a court of equity, and can only be enforced by a court of law.[3]

§ 483. **When a court of equity has no jurisdiction to enforce payment of municipal securities.**—Where a contract is void at

[1] State *v.* City of New Orleans, 34 La. An. 477; Nelson *v.* St. Martins Parish, 111 U. S. 716; United States *v.* School District, 20 Fed. R. 294; East St. Louis *v.* Zebley, 110 U. S. 321; Township of Dayton *v.* Rounds, 27 Mich. 82; Wilkinson *v.* Cheatham, 43 Ga. 258; People *v.* Supervisors, 10 Wend. 363; People *v.* Supervisors, 51 N. Y. 401; Robinson *v.* Supervisors, 43 Cal. 353; Trustees of Cass *v.* Dillon, 16 Ohio St. 38; County Comrs. *v.* King, 13 Fla. 451; State *v.* Harris, 17 Ohio St. 608; Gardner *v.* Haney, 86 Ind. 17; Commonwealth *v.* City of Pittsburg, 88 Pa. St. 66.

[2] Walkley *v.* Muscatine, 6 Wall. 481; Rees *v.* City of Watertown, 19 Wall. 107; Heine *v.* The Levee Commissioners, 19 Wall. 655; Barkley *v.* Levee Comrs , 93 U. S. 258; Thompson *v.* Allen Co., 115 U. S. 550.

[3] Heine *v.* The Levee Comrs., 19 Wall. 655; Meriwether *v.* Garrett, 102 U. S. 472; State *v.* McCrillus, 4 Kan. 250.

law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident or mistake, to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction or the contract is declared void because not in compliance with express statutory or constitutional provision, a court of equity can not interpose to give validity to such transaction or contract, or any part thereof.

Hence, a court of equity has no jurisdiction to enforce the payment of municipal securities issued in violation of an express constitution or statutory provision.[1]

§ 484. **A court of equity has no power to scale down bonds issued in excess of the constitutional limit.**—Where municipal bonds issued in aid of a railroad had been declared void in a court of law as in excess of the constitutional limit of indebtedness, a court of equity has no power to scale down the issue to the limit and enforce it against the municipality, the contract being indivisible and void *in toto*, and there being no executed consideration to support an implied promise.[2]

The case of Hedges *v.* Dixon Co. was appealed to the supreme court of the United States, and the judgment of the circuit court was affirmed. The court held that the holders of bonds issued by a county in excess of its authority can not, by an offer to surrender and scale so much of such bonds as exceeds the limit authorized, have relief in a court of equity, decreeing the residue of such bonds valid and enforcing the payment thereof against the county, where the county received no part of the proceeds of the bonds, but they were issued as a donation to a railroad company. And a provision in the state constitution that a municipal corporation shall not become indebted to an amount exceeding a certain per cent. of its taxa-

[1] Hedges *v.* Dixon Co., 150 U. S. 182; Ætna Life Ins. Co. *v.* Middleport, 124 U. S. 534.

[2] Hedges *v.* Dixon Co., 37 Fed. R. 304; Dixon Co. *v.* Field, 111 U. S. 83; Daviess Co. *v.* Dickinson, 117 U. S. 657.

ble property forbids implied as well as express liability on bonds issued contrary to such provisions. Where the transaction or the contract is declared void because not in compliance with the express statutory or constitutional provision, a court of equity can not interpose to give validity to such transaction or contract or any part thereof.[1]

§ 485. **Right of subrogation of invalid bonds issued in exchange for valid warrants.**—Where municipal bonds were issued in exchange for municipal warrants and were declared void because issued in violation of law, within a year after the organization of the municipality, one who purchased such bonds was entitled to be subrogated to the rights of the holders of the warrants for which the bonds were issued.[2]

§ 486. **Creditor's bill in an action on municipal warrants, when allowed.**—An action in the nature of a creditor's bill may be maintained under the Kansas code, for the purpose of subjecting to the payment of a judgment a county warrant in the hands of a county clerk, which can not be reached by an execution or by ordinary proceedings in aid thereof; but before the judgment creditor can avail himself of such a remedy it must appear that the debtor has no personal or real property subject to levy on execution sufficient to satisfy the judgment.[3]

§ 487. **Remedy to compel the issue of municipal bonds under the Illinois statute.**—A court of chancery has no jurisdiction to entertain a bill to compel the corporate authorities of a municipality to issue and deliver its bonds in pursuance of a vote to aid in the construction of a railroad under the Illinois statute. The proper remedy is by mandamus. Such

[1] Hedges *v.* Dixon Co., 150 U. S. 182.

[2] Irvine *v.* Board of Comrs., 75 Fed. R. 765; Chapman *v.* County of Douglass, 107 U. S. 360; Logan Co. Nat'l Bank *v.* Townsend, 139 U. S. 67; Anthony *v.* Jasper Co., 101 U. S. 693; Shirk *v.* Pulaski Co., 4 Dillon 209. But see Aetna Life Insurance Co. *v.* Middleport, 124 U. S. 534, 8 Sup. Ct. R. 625.

[3] Clark *v.* Bert, 2 Kan. Court of App. 407; Switzer *v.* City of Wellington, 40 Kan. 250; National Bank *v.* City of Ottawa, 43 Kan. 294; Ludes *v.* Hood, 29 Kan. 49; Pendleton *v.* Perkins, 49 Mo. 565.

court has not the power to compel the performance of contracts for the payment of money or to give notes or bonds. Hence a bill can not be maintained as a creditor's bill when not framed as such, nor when no judgment has been obtained and execution returned *nulla bona*.[1]

§ 488. **Prior adjudication, when a bar to any further litigation concerning the validity of bonds.**—Where a bill was filed by certain tax-payers of a corporation on behalf of themselves and other tax-payers against a railway company, the corporation and its officers, to enjoin them from issuing certain bonds in aid of a railway company, and where the liability of the corporation to issue such bonds was adjudged against the corporation, under a bill denying such liability, other tax-payers and citizens of the corporation will be concluded by the decree, and they can not, by another bill to prevent the collection of a tax to pay such bonds when issued, dispute their validity upon any of the grounds which were or could have been litigated in the prior suit. The value of a plea of a former recovery does not depend upon the reasons given by the court for rendering the judgment or decree. The principle of *res adjudicata* extends not only to the questions of law and fact which were decided in the former suit, but also to the grounds of recovery or defense which, under the issues, might have been, but were not, presented.[2]

§ 489. **Suit of tax-payers involving validity of municipal bonds, upon whom decree binding.**—Where a bill was filed by certain tax-payers of a municipal corporation on behalf of themselves and other tax-payers, against a railway company and

[1] Chicago, etc., Railroad Co. *v.* Town of St. Anne, 101 Ill. 151; Thomas *v.* County of Morgan, 59 Ill. 479; Morgan Co. *v.* Thomas, 76 Ill. 120; Morris *v.* Cheney, 51 Ill. 451.

[2] Harmon *v.* Auditor of Public Accounts, 123 Ill. 122; State *v.* Railroad Co., 13 So. Car. 290; Terry *v.* Town of Waterbury, 35 Conn. 526; Sabin *v.* Sherman, 28 Kan. 289; Smith *v.* Swormstedt, 16 How. 288; Girardin *v.* Dean, 49 Texas 243; Barrett *v.* Failing, 8 Ore. 152; Freeman on Judgments, § 275; Davis *v.* Tallcott, 12 N. Y. 184; Beloit *v.* Morgan, 7 Wall. 619; Rogers *v.* Higgins, 57 Ill. 244; Ruegger *v.* Indianapolis, etc., Railroad Co., 103 Ill. 449; Hamilton *v.* Quimby, 46 Ill. 90; Aurora City *v.* West, 7 Wall. 82; McMicken *v.* Morgan, 9 La. Ann. 208; Preble *v.* Board of Supervisors, 8 Biss. 358.

the corporate authorities, to enjoin such corporation and its officers from issuing bonds of the corporation to the railway company, in pursuance of a vote at a special meeting, and the case was dismissed on appeal for want of equity, the court holding that there was no sufficient ground shown for the relief sought, it was held that the obligation resting upon the corporation to issue the bonds was just as binding, by reason of the decision of the appellate court, as though the judgment had been rendered in a mandamus proceeding, or in a suit on the bonds.[1]

§ 490. **Creditor's bill when two municipal corporations are formed out of one.**—The rights of creditors of the city of Duluth was under consideration in an action brought against that city and the village of Duluth, to recover the coupons overdue upon bonds of the city of Duluth, with reference to the act of the legislature of the state of Minnesota, by which the village of Duluth was created out of a part of the territory of the city of Duluth, and the indebtedness of the city apportioned between them. It was held by the United States circuit court for the district of Minnesota that a bill in equity would lie by a creditor of the city at the time the act was passed against the village, to enforce the payment of its proportionate share of its indebtedness, that is, the share of the indebtedness for which each is liable, being in the ratio of taxable property of one to that of the other.[2]

§ 491. **When a bill of interpleader may be maintained by municipal officers.**—A party filed a bill of interpleader in his official capacity as judge of the probate court of a county claiming to hold as agent for the county and by its authority, a certain fund accruing from taxes levied under the provisions of an act for the adjustment and compromise of certain in-

[1] Harmon *v.* Auditor of Public Accounts, 123 Ill. 122; Concoran *v.* Chesapeake and Ohio Canal Co., 94 U. S. 741; Lewis *v.* Brown Tp., 109 U. S. 162; Scotland Co. *v.* Hill, 112 U. S. 183; Clark *v.* Wolf, 29 Iowa 197; Treadway *v.* The Sioux City, etc., Railway Co., 39 Iowa 663; State *v.* Rainey, 74 Mo. 229; Commissioners *v.* Hinchman, 31 Kan. 729.

[2] Brewis *v.* City of Duluth and Village of Duluth, 9 Fed. R. 747.

debtedness of certain counties in the state. The bill alleged that the defendants had each claimed to be the owners of certain bonds or obligations against the county which had been filed for compromise and settlement with the state auditor, as required by the act, and that the money held by the complainant was due as a remaining balance on such claims. The prayer of the bill was that the defendants be required to interplead among themselves as to who was entitled to the funds in complainant's hands. A demurrer to the bill was sustained. The court held that the bill was improperly filed in the name of the complainant, whether in his official capacity, personally or as a mere agent. It was further held that if the county was regarded as the owner of the fund, the bill, if it would lie at all, should have been brought in the name of the county itself as complainant, and not in the name of its agent. The probate judge is not made the custodian of the fund by law. He was not the debtor of the defendant or either of them. His interest in the fund was that of a mere naked bailee, or agent for a known and disclosed principal. The defendants had a right to have the principal before the court as a party to the record, so that it may be bound by the decree rendered without resort to extrinsic evidence to prove that the agent was acting by its authority in bringing the suit. Hence a principal can not bring an interpleader in the agent's name when the agent is the mere naked custodian of the disputed funds without title or interest in it.[1]

§ 492. **Liability of municipality for purchase-money expended upon public works.**—The holders of bonds, and agents of a municipal corporation, are *particeps criminis* in the act of violating a constitutional prohibition of the state which provides that no municipality shall become indebted in any manner or for any purpose beyond a certain per centum of the taxable property therein, and equity will no more raise a resulting trust in favor of the holders than the law will raise an implied *assumpsit* for money had and received. The purchasers of bonds issued in

[1] Patrick *v.* Robinson, 83 Ala. 575, s. c. 3 So. R. 694.

excess of the constitutional limit have no lien upon public works upon which the purchase-money is alleged to have been expended if other funds have also been expended upon such works. Hence, where the complainant seeks to recover the money he let the municipality have he must clearly identify it or the fund or other property which represents it in such a manner that it can be reclaimed and delivered without taking other property with it, or injury to other persons, or interfering with other rights. A decree which does not attempt to restore the specific money of the complainant, but which is for a sum equal in amount to the bonds and interest, being a decree to pay as on an implied contract, can not be sustained.[1]

Other Remedies.

§ 493. **The general rule—When an action for money had and received may be maintained.**—As a general rule, if a municipal corporation has received money for an authorized purpose, derived from the issue of voidable bonds, and has applied the money to a legitimate corporate purpose, an action will lie as for money had and received, although the corporation had defectively or irregularly issued the bonds.[2]

§ 494. **Illustrations of the rule.**—This question has been under consideration by the supreme court of the United States in several important cases. The first case involving this subject is Louisiana *v.* Wood.[3]

In this case the statute required that the bonds issued by a city should be registered. But, in order to evade that law the officers of the city who issued the bonds antedated them, and thus the bonds which were issued bore a false date which apparently made them obligatory and binding ; they were sold by the city and purchased by the holder in good faith, and the money paid therefor went directly into the city's treasury. The supreme court held that the city was in the market as a

[1] Litchfield, *v.* Ballou, 114 U. S. 190. Douglass, 107 U. S. 348; Hitchcock *v.* Galveston, 96 U. S. 341.

[2] Louisiana *v.* New Orleans, 102 U. S. 203; Chapman *v.* County of

[3] Louisiana *v.* Wood, 102 U. S. 294.

borrrower and received the money in that character, notwithstanding the transaction assumed the form of a sale of her securities which, being effectively executed, a suit could not be maintained thereon, but that the holder was entitled to recover the money paid, with interest thereon from the time the obligation of the city to him was denied. It is a rule of the common law that an action lies for money paid by a mistake, or upon a consideration which happens to fail, or for money got through imposition.[1]

The court held that this case was sustained on either of those grounds; the money was paid for bonds apparently well executed, which in fact they were not because of the false date they bore. This was clearly money paid by mistake. The consideration on which the payment was made had failed because the bonds were not in fact valid obligations of the city. And the money was got through imposition because the city, with intent to deceive, pretended that the false date the bonds bore was the true one.[2]

In another case in which the same question was considered by the supreme court, the bonds were issued by a city for the purpose of raising money for the purposes of constructing a high school building within her limits. The bonds were sold and the proceeds applied to that purpose. The legislature subsequently legalized the proceedings of the city in the premises, but this act of the legislature was passed after the constitution of the state went into effect, declaring that the "legislature shall pass no special act conferring corporate powers," and that "no bill shall contain more than one subject, which shall be clearly expressed in its title." A purchaser of the bonds for value without notice of any infirmity in their issue brought suit to recover the amount of the coupons then due and unpaid. The supreme court held that as, by force of the transaction, the city was bound to refund the moneys paid it in consideration of its void bonds, and as the act by confirming them merely recognized the existence of that obligation and provided a me-

[1] Moses *v.* MacFarlan, 2 Burr. 1005. [2] Louisiana *v.* Wood, 102 U. S. 294; Marsh *v.* Fulton Co., 10 Wall. 676.

dium for enforcing it according to the original intention of the parties, no new corporate powers were thereby conferred.[1]

In these cases the city received the full pecuniary consideration for the bonds, and applied the money for the very purpose for which they were issued; and upon well settled principles if the securities given for the money so obtained proved invalid or defective for any reason, there was a clear legal as well as moral obligation to refund the money, which had been so advanced to and received by the city.

So, too, it has been held that where a municipal corporation without power to make negotiable obligations sells its void bonds, and receives the money therefor and applies it to its legitimate corporate uses, an action will lie to recover the money so received and applied.[2]

§ 495. **When a purchaser can not maintain an action for money had and received on void bonds.**—The principles enunciated in the preceding sections do not apply to holders of municipal bonds issued by a municipality in excess of its authority, that is, in express violation of some constitutional or statutory provision. Thus, bonds were issued by the city of Litchfield, under authority of the statute of Illinois and an ordinance of the city, for the construction of a system of waterworks for the use of the municipality, and neither the statute nor the ordinance contained any reference to the provisions of the constitution prohibiting any municipality from becoming indebted in any manner or for any purpose exceeding five per cent. of the taxable property therein. The ordinance of the city made no reference to or mention of the indebtedness of the city, although at that time it exceeded the constitutional limit. A *bona fide* holder of the bonds brought suit upon the unpaid coupons thereto attached, and it was held by the supreme court of the United States that the bonds were void. A suit in equity was then brought to enforce the payment of the money

[1] Read *v.* Plattsmouth, 107 U. S. 568. [2] Gause *v.* City of Clarksville, 1 Fed. R. 353.

loaned and of which the city received the benefit, but it was held that there could be no recovery.[1]

Where the bonds of a municipal corporation were declared void because they were issued under an act violating the constitution of the state, which declares that the general assembly shall not authorize any municipal corporation to loan its credit to any corporation unless two-thirds of the qualified voters assent thereto, it was held that a purchaser could not maintain an action for money had and received to recover the amount paid to the municipality for such bonds. As the municipality had no power to create the debt, no implied promise could arise for its payment, notwithstanding the general statute of the state gave the board of trustees power "to borrow money for the improvement of the municipality," the money having been borrowed in violation of the constitution, and not for the improvement of the municipality, but to buy the right of way and depot grounds of a railroad.[2]

§ 496. **Bonds issued for labor—Liability of assignee in the absence of power to issue commercial paper.**—Under the power vested by a statute in a municipal corporation, whereby it may contract for the erection of public improvements, and issue its bonds in payment for the work performed, a bond so issued for work actually done becomes a voucher or evidence of indebtedness to that extent, and may be recovered upon by an assignee in good faith, even though such corporation had never been specifically empowered to issue negotiable paper.[3]

[1] Buchanan *v.* Litchfield, 102 U. S. 278, 114 U. S. 190; Litchfield *v.* Ballou, 5 Sup. Ct. R. 820; Hedges *v.* Dixon County, 150 U. S. 182, 14 Sup. Ct. R. 71.

[2] Morton *v.* City of Nevada, 41 Fed. R. 582; Town of Hackettstown *v.* Swackhamer, 37 N. J. L. 191; Litchfield *v.* Ballou, 114 U. S. 190; Buchanan *v.* Litchfield, 102 U. S. 278; Jarrolt *v.* Moberly, 103 U. S. 580.

[3] Dorian *v.* City of Shreveport, 28 Fed. R. 287; Oubre *v.* Town of Donaldsonville, 33 La. 386; Louisville, etc., Railroad Co. *v.* Letson, 2 How. 497; Mercer Co. *v.* Hackett, 1 Wall. 83; Grand Chute *v.* Winegar, 15 Wall. 355; San Antonio *v.* Mehaffy, 96 U. S. 312; Reynolds *v.* Mayor, etc., of City of Shreveport, 13 La. 426; Wall *v.* County of Monroe, 103 U. S. 74; Claiborne Co. *v.* Brooks, 111 U. S. 400; Mayor *v.* Ray, 19 Wall. 468; Hitchcock *v.* Galveston, 96 U. S. 341.

§ 497. **When suit will lie for money paid for void warrants.** —Where a party had bought what she supposed were, and what purported to be, the warrants of a certain municipality, but which having been issued by the municipal authorities without authority of law and hence were void, and of no value, in an action to recover the price for such void warrants, it was held that the pretended warrants were not a valid consideration for the money paid therefor, but that the party who had purchased such void warrants in good faith was entitled to recover the actual price paid for what had proved to be void warrants.[1]

The principle upon which this case was decided was applied in the case of Young *v.* Cole.[2]

In the case of Young *v.* Cole the sale under consideration was of certain Guatamala bonds which had been repudiated by the government of that state because they had not been stamped and were therefore valueless, of which facts both seller and purchaser were at the time ignorant, and it was held that the defendant should restore the price he had received for such void bonds. In commenting upon the facts in that case, Tindle, C. J., said: "That the contract was for real Guatamala bonds, and the question was not one of warranty, but whether defendant had not delivered something which, though resembling the article contracted to be sold, was of no value."

§ 498. **Action against a treasurer for moneys collected as taxes to pay void bonds.**—A municipal corporation issued certain bonds to a private individual to aid a purely private enterprise and which were, therefore, wholly *ultra vires* and void. And afterwards the city council passed an ordinance providing for the levy of taxes to pay certain coupons on these bonds and the amount of this levy was reduced by the city clerk without authority and entered by him in a separate column on the county tax-roll, and then the tax-roll was turned over to the county treasurer and the county treasurer thereafter at the usual time received from the tax-payers this tax and paid it

[1] Rogers *v.* Walsh, 12 Neb. 28.

[2] Young *v.* Cole, 32 Eng. Com. Law, 724; Benjamin on Sales, 607.

over to the city treasurer. The city treasurer then refused to pay it over on demand of the holders of the coupons on the ground that they were void. The supreme court of Kansas held that the holder could not maintain an action against the treasurer for the money thus received, and for failure to pay the coupons on presentation. The opinion of the court was delivered by Mr. Justice Brewer, and, in concluding the opinion, he used the following language: "A party to whom neither the tax-payers nor the city owes a dollar asks the court to compel the official custodian of the city's fund to pay him a portion of the money in his hands received in the form and through the process of taxation, upon the claim that these tax-payers placed these moneys in the treasurer's hands, and the treasurer received them upon the request on the one hand and the promise on the other to receive the moneys and pay them over to the claimant, when there is no proof of any such express promise or request, or that the parties acted otherwise than in obedience to the supposed obligations of the taxing process and official station. Whether this money, thus erroneously paid, is the property of the municipality, or of the parties paying it to the treasurer, is a question to be decided whenever properly presented. It is enough now to decide that it does not belong to the plaintiff."[1]

§ 499. **When county commissioners may recover back money paid on county warrants.**—Where a party obtains an allowance by the board of county commissioners for damages sustained by the location of a highway through his land, and appeals from such order to the circuit court, such appeal and a dismissal of the proceedings annuls such allowance under the statutes of Indiana, and money thereafter paid to him by the county treasurer upon a warrant drawn by the auditor for such allowance may be recovered back by the county commissioners in an action therefor. And the fact that the county auditor supposed that such allowance was unaffected by such appeal constitutes no defense to such action; nor does the act

[1] McConnell *v.* Hamm, 16 Kan. 228; Gray, Receiver, 5 Okla. 216; Martin Spencer, Treas. City of Guthrie, *v. et al. v.* Gray, 5 Okla. 188.

of the auditor in drawing the warrant in good faith bind the county, as he has no authority, in the absence of an order, to draw warrants upon the treasurer, and such act is, therefore, void.[1]

[1] Booth *v.* Board of Commissioners of Cass Co., 84 Ind. 428; State *v.* Buckles, 39 Ind. 272; Ware *v.* State, 74 Ind. 181.

CHAPTER XXI.

PLEADING AND PRACTICE.

§ 500. What is essential to plead in actions upon bonds and warrants.

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535. Misappropriation of proceeds of bonds as a defense.
536. Burden of proof.
537. How fraud must be pleaded.

§ 500. **What is essential to plead in actions upon bonds and warrants.**—Where municipalities have no inherent or general power to issue bonds, and their power to issue such securities arises from the special acts or from general laws for limited and specifically defined purposes, it is necessary to allege in suing upon the bonds that they were issued by special authority or for some purpose for which the municipality has the right and power to issue them.[1]

But where several bonds were declared on as negotiable instruments duly issued by the county court, "for the purpose of erecting a good and sufficient jail," and for other specified purposes, for all of which purposes the law did in fact authorize the issue, it was held to be unnecessary to negative an issue exceeding the prescribed limit. Their amount was within the limit of the power of the county court, the petition having charged that they were duly issued by that court. If in fact, power of the court in this respect had been exhausted by previous issues, that fact was properly a matter of defense.[2]

Where a statute gave authority to certain commissioners to issue bonds of a city for certain purposes, which were to be de-

[1] Donaldson *v.* County of Butler, 98 Mo. 163; Kennard *v.* Case Co., 3 Dill 147; Thayer *v.* Montgomery Co., 3 Dill. 389. But see as to the rule where there is general authority. Ring *v.* The County of Johnson, 6 Iowa 265; Lincoln *v.* Iron Co., 103 U. S. 412.

[2] Catron *v.* Lafayette Co., 106 Mo. 659, 17 S. W. R. 577; State *v.* Clark, 42 Mo. 519; Railroad Co. *v.* Otoe Co., 1 Dill. 338; County of Montgomery *v.* Auchley, 92 Mo. 126.

nominated on their face, "Rahway City Water Bonds," in an action against the city it was held that an allegation that the bonds were issued by the city was proper.[1]

A plea averring that bonds sued upon were issued without any consideration valid in law, and are null and void, as plaintiff well knew when he received them, and that the consideration therefor had failed, but failing to aver any facts constituting such failure, is insufficient.[2]

In an action on railroad aid bonds, a simple allegation in the petition that "an election was duly held" to determine whether the subscription should be made has been held sufficient; and any irregularities in the manner of the holding such election are matters of defense.[3]

The plaintiff need not allege the reservation made in the bonds by the municipality as to the time of payment, where there is no such reservation in the act authorizing the subscription, for the power to issue the bonds was in nowise affected thereby.[4]

It has been held, however, that a plea averring that municipal bonds are void because two-thirds of the qualified voters of the municipality did not vote at the election held to ascertain whether or not said bonds should be authorized to be issued, and that the plaintiff knew when it received the bonds that two-thirds of the qualified voters had not voted in favor of the issue, must also aver how many votes were cast in favor of, and how many against, authorizing the issue, so that the court may be enabled to decide from the face of the pleadings whether or not the defense is valid under the statute authorizing the issue of such bonds.[5]

[1] Rahway Savings Inst. *v.* Mayor, 53 N. J. L. 48, 20 Atlantic R. 756; Burnham *v.* City of Milwaukee, 69 Wis. 379; Reed *v.* Town of Orleans, 1 Ind. App. 25, 27 N. E. R. 109; City of Jeffersonville *v.* Myers, 2 Ind. App. 532, 28 N. E. R. 999.

[2] Mobile Savings Bank *v.* Board of Supervisors, 24 Fed. R. 110.

[3] Breckinridge Co. *v.* McCracken, 61 Fed. R. 191, 197, 9 C. C. A. 442. See Lincoln *v.* Iron Co., 103 U. S. 412. But compare Cotton *v.* New Providence, 47 N. J. L. 401; New Providence *v.* Halsey, 117 U. S. 336.

[4] Breckinridge Co. *v.* McCracken, 61 Fed. R. 191, 9 C. C. A. 442.

[5] Mobile Savings Bank *v.* Bd. of Supervisors, 22 Fed. R. 580; Carroll Co. *v.* Smith, 111 U S. 556; Hawkins *v.* Carroll Co., 50 Miss. 735. The provision of constitution in question as

It has been held that in a mandamus proceeding to compel the levy and collection of a tax to pay the bonded indebtedness of a municipal corporation held by the petitioner, a failure to demand proper action on the part of the officers of the corporation is not excused by an averment in the petition that the corporation and its authorities wholly neglected and refused to make any provisions for the payment of the bonds, and that because of the failure and refusal of the corporation and its officers to make such provision a formal demand would prove unavailing.[1]

It has been held, in Nebraska, that whoever deals with a municipality and takes in payment of his demand a warrant, no time of payment being fixed, does so under an implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition and the laws regulating and controlling the business of the county. He can not be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment of judgment and execution, without regard to the condition of the treasury at the time, or the laws by which the revenues are raised and disbursed. Hence, a petition alleging the issue and non-payment of a municipal warrant, without alleging that there is money in the treasury for its payment or that time has elapsed for the collection of the money by taxation, will be dismissed without prejudice.[2]

The federal courts have jurisdiction of an action on municipal warrants made payable to certain payees, or bearer, where the assignee of such warrant, who brings the action, is a non-resident of the state in which the municipality is situated, whether the payees named in the warrant were citizens of such state or not.[3]

construed by the court required a majority of two-thirds of the votes actually cast.

[1] People *v.* Town of Mt. Morris, 137 Ill. 576, 27 N. E. R. 757; Ingerman *v.* State, 128 Ind. 225.

[2] Brewer *v.* Otoe Co., 1 Neb. 373.

[3] Board, etc., of Kearney Co. *v.* McMaster, 68 Fed. R. 177, 15 C. C. A. 353.

And the transferee of coupons by delivery and assignment from a *bona fide* holder may maintain an action on the coupons, whether he gave any consideration for them or not.[1]

§ 501. **What is essential in pleading the statute of limitations.**—Under a statute providing that municipal warrants not presented within five years, or being presented within that time, and protested for want of funds, and not presented again within five years after funds shall have been set apart for the payment thereof, shall be barred, a declaration showing the warrants were duly issued and presented within that time and that they have not since been paid, is good on demurrer, though more than five years have elapsed since their presentation, and the appropriation of money for the payment and non-presentation for more than five years thereafter should be shown by plea.[2]

§ 502. **What essential in pleading a constitutional limit of indebtedness.**—In an action against a municipality on warrants given in satisfaction of a judgment an answer which alleged that at the time the judgment was rendered the debt exceeded the constitutional limit, without stating that such debt exceeded the limit at the time of making the contract on which judgment was rendered, was held demurrable.[3]

§ 503. **When a municipality may plead estoppel as a defense to the bonds.**—The decision adverse to the defendant in an action involving the validity of coupons of a bond does not necessarily estop the defendant from setting up the invalidity of a bond itself in a subsequent action upon it.[4] Nor is a suit

[1] Dudley *v.* Board, 80 Fed. R. 672; Sheridan *v.* Mayor, 68 N Y. 30. See, also, McCall *v.* Town of Hancock, 10 Fed. R 8; Pierce *v.* Town of St. Anne, 30 Fed. R. 36.

[2] United States *v.* Brown, 41 Fed. R. 481; United States *v.* County of Clark, 96 U. S. 211; Knox County Court *v.* United States, 109 U. S. 229; Logan *v.* County Court, 63 Mo. 341; Bellville Sav. Bank *v.* Winslow, 30 Fed. R. 488.

[3] Wilder *v.* Board of County Comrs., 41 Fed. R. 512; Lake Co. Cases, 130 U. S. 662, 674.

[4] Nesbit *v.* Independent School Dist., 25 Fed. R. 635, affirmed in 144 U. S. 610, 12 Sup. Ct. R. 746. See, also, Geneva Nat. Bank *v.* Independent School Dist., 25 Fed. R. 629; Crom-

upon one coupon necessarily a bar to a subsequent suit on another which was also due at the time of the first suit.[1] But it has been held that where a county issues railway aid bonds and afterwards brings suit against the company to restrain the negotiation of the bonds, which suit is decided against the county, it is estopped from setting up, as against subsequent *bona fide* purchasers of the bonds, any ground of illegality which it might have set up in its suit against the company.[2]

§ 504. **Want of consideration as a defense to municipal warrants.**—A municipal warrant or order on its treasurer for the payment of money is a contract; and, in an action thereon by the holder, a plea of want of consideration is good.[3]

A municipal warrant drawn on the treasurer is *prima facie* evidence of the indebtedness of the municipality on which an action will lie.[4] It is predicated upon an allowance made by the authorized agents of the municipality. It passes by delivery. If on presentation to the treasurer it is not paid, it bears interest. Municipal warrants are a subject of trade, and their value is quoted in market reports and by statute certain officers are prohibited from trafficking in them. A warrant is not, however, like a bond of a county, issued only as an evidence of debt, and having a negotiable character, and hence an action on it is liable to be defeated by showing that the tribunal which issued it had no authority to make the allowance on which the warrant issued.[5]

well *v.* County of Sac, 94 U. S. 357. But compare Aurora City *v.* West, 7 Wall. 82; Beloit *v.* Morgan, 7 Wall. 619, and see *post*, § 529.

[1] Butterfield *v.* Town of Ontario, 44 Fed. R. 171. See, also, Stewart *v.* Lansing, 104 U. S. 505.

[2] Preble *v.* Supervisors, 8 Biss. (U. S.) 358.

[3] City of Connersville *v.* Connersville Hydraulic Co., 86 Ind. 235; Jewett *v.* Honey Creek Co., 39 Ind. 245; Washington Tp. *v.* Bonnie, 45 Ind. 77.

[4] Hefflleman *v.* Pennington County, 3 S. Dak. 162, 52 N. W. R. 851; Comrs. of Leavenworth Co. *v.* Keller, 6 Kan. 510; Commissioners' Court *v.* Moore, 53 Ala. 25, and cases cited in next note below.

[5] Comrs. of Leavenworth Co. *v.* Keller, 6 Kan. 510; People *v.* Supervisors, 11 Cal. 170; Stetson *v.* Kempton, 13 Mass. 272; Parsons *v.* Inhabitants of Goshen, 11 Pick. (Mass.) 396; Campbell *v.* County of Polk, 3 Iowa 467; Clark *v.* City of Des Moines, 19 Iowa 199; Clark *v.* Polk Co., same, 248.

§ 505. **Set-off as a defense to municipal warrants.**—Where, in an action upon a municipal warrant or order by the holder, the corporation answers, by way of set-off, that the holder is indebted to the corporation for taxes in a certain sum, but fails to allege any facts showing his or his property's liability to taxation, or the corporation's authority to levy and collect taxes, such answer is insufficient on demurrer.[1]

§ 506. **When ultra vires not a defense to municipal aid bonds.**—A municipality with general power to lend its credit in aid of railroads, issued bonds in exchange for the stock of a railway company on condition that the company build a railway of standard gauge through the municipality, which condition was subsequently fulfilled. In making this issue all formalities required by law were complied with. In an action upon the bonds it was held by the circuit court of appeals of the Eighth Circuit that the municipality could not set up the defense of *ultra vires* merely because the railway company was authorized to build only a narrow gauge railroad.[2]

§ 507. **Injunction to restrain issuing railroad aid bonds—Railroad company, when not a necessary party.**—The railroad company is not a necessary party defendant in an action brought by a municipal township against the board of county commissioners and the county clerk, to perpetually enjoin them, as agents of the township, from subscribing to the capital stock of the railroad company, and executing bonds of the township in payment therefor, under the pretended authority of a special election, held to take the sense of the electors of the township upon the subscription of stock and the issuing of

[1] City of Connersville *v.* Connersville Hydraulic Co., 86 Ind. 235; Lewis *v.* Edwards, 44 Ind. 333; Lane *v.* Miller, 27 Ind. 534; Snowden *v.* Wilas, 19 Ind. 10.

[2] Board of Commissioners *v.* Cornell University, 57 Fed. R. 149, 6 C. C. A. 296; Silver Lake Bank *v.* North, 4 Johns Ch. 370; National Bank *v.* Mathews, 98 U. S. 621; Gold Mining Co. *v.* National Bank, 96 U. S. 640; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Bradley *v.* Ballard, 55 Ill. 413; Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543; Argenti *v.* City of San Francisco, 16 Cal. 255; Allegheny City *v.* McClurkin, 14 Pa. St. 81; County of Macon *v.* Shores, 97 U. S. 272; County of Ralls *v.* Douglass, 105 U. S. 728.

bonds, where the petition alleges the conditions precedent to the power of the county board to call the election and make any subscription were not complied with.[1]

§ 508. **Action by third party on railroad aid bonds, when not maintained.**—Where a railroad company has a claim against a municipality for the recovery of bonds upon a subscription to its capital stock, a creditor of the company, who is a stranger to the municipality and has no legal or equitable assignment of the claim of the railroad company, can not maintain an action against the municipality to recover bonds in payment of its claim against the railroad company prior to the rendition of a judgment against the company, and such a creditor is not entitled to maintain an action against the municipality, although he joins as a defendant in the action the railroad company which is indebted to him.[2]

§ 509. **Judgment upon bonds, when conclusive.**—When a judgment was rendered for the interest upon certain municipal bonds, issued by a municipality to aid in the construction of a railroad, the fact that the supreme court of the state in which the bonds were issued, and the supreme court of the United States, afterwards decided that such bonds were void for want of power in the municipality to issue the same, did not affect the conclusiveness of such judgment in a case where no appeal or writ of error had been taken. And after the judgment had been rendered against a municipality by a court of competent jurisdiction, even if the court erred in so rendering it, the judgment was binding upon the municipality until it was reversed by an appellate court, and the officers of the municipality had no discretion, but were bound to audit such indebtedness as a proper charge against the municipality.[3]

[1] Township of Dixon *v.* Comrs. of Sumner Co., 25 Kan. 519; Paola Railroad Co. *v.* Anderson Co., 16 Kan. 302; Atchison, etc., Railroad Co. *v.* Comrs. of Jefferson Co., 12 Kan. 127.

[2] Smith *v.* Comrs. of Bourbon Co., 43 Kan. 619; Sere *v.* Pitot, 6 Cranch 332; Smith *v.* Railroad Co., 99 U. S. 398; Smith *v.* Bourbon Co., 127 U. S. 105.

[3] United States *v.* Board of Auditors, 28 Fed. R. 407; City of Chicago *v.* Hasley, 25 Ill. 485; President, etc., of Town of Odell *v.* Schroeder, 58 Ill.

§ 510. **Illustrations.**—On an application for a writ of mandamus to compel a city to pay a judgment regularly obtained against it, such judgment is conclusive as to the city's liability, and no defense can be made on the ground that the debt is not paid out of the revenues for the year for which it was contracted, under the statutes of the state which provide that no municipal corporation shall expend any money in any year in excess of the actual revenue for that year, and that the revenue for each year shall be devoted to the expenditure thereof. Thus, the legislature having declared that a ten mill tax is sufficient to provide for the city's bonded expenditures, it is not within the discretion of the council to exhaust the entire revenue with one class of disbursements, and leave others to accumulate; and a writ of mandamus will issue to compel it to pay a valid judgment against the city, either out of the surplus revenues for the current year, or, if there is no available surplus, to include it in the budget for the ensuing year. And a claim that the city is not bound to pay the judgment out of the revenues for the current year, because the whole thereof was necessary for ordinary expenses, is without merit when it appears that $20,000 of such revenues was expended for a drainage machine which is a permanent improvement, and that the surplus was over $350,000, a large portion of which remained unexpended.[1]

The supreme court of the United States has held that where a judgment has been rendered by the state supreme court against the validity of coupons of county bonds, their owner, who was a party to such judgment, can not, while still owning them, recover upon them in another action in a third person's name. Such judgment pleaded in a new action is a conclusive answer to the truth founded upon those coupons. But a *bona fide*

355; City of Paris *v.* Cracraft, 85 Ill. 294; Norton *v.* Peck, 3 Wis. 714; Rumford *v.* Wood, 13 Mass. 193; Drake *v.* Phillips, 40 Ill. 388; Town of Lyons *v.* Cooledge, 89 Ill. 529; Supervisors *v.* United States, 4 Wall. 435. See, also, Board *v.* Platt, 79 Fed. R. 567.

[1] City of New Orleans *v.* United States, 49 Fed. R. 40, 1 C. C. A. 148; United States *v.* New Orleans, 98 U. S. 381; Louisiana *v.* Police Jury, 111 U. S. 716.

holder of other coupons who has purchased them for a valuable consideration, without actual notice of any defense which could be set up against them, where there was legislative authority for the issue of the bonds, and the condition upon which it was allowed to be exercised had been fulfilled, is entitled to enforce them. And the supreme court will not follow a state judgment not given until after the bonds were issued and after the rights of holders thereof had become fixed, which is not in harmony with the rulings of that court, made and repeated through a long series of years.[1]

§ 511. **When judgment against a municipality is not conclusive as to the validity of a debt.**—As already stated, the general rule is that a judgment is conclusive between the parties as to all matters that were or might have been litigated under the issues, but a judgment against a municipality is not conclusive as to the validity of a debt, and why it was rendered, where it does not appear that the question of the legality of the debt was put in issue by the pleadings.[2]

§ 512. **A compromise judgment, when not a valid defense to an action upon bonds.**—A municipal corporation is not estopped from making a defense of want of legislative power by reason of the fact that certain tax-payers and the mayor and board of aldermen filed a bill in chancery setting up the want of power, and enjoining the original holder from negotiating certain bonds issued in aid of a railroad company; in which suit, the railroad company having demurred, there was a compromise agreement between the parties that the municipality should take the stock and issue the bonds, that the court should declare them valid, overrule the demurrer and dismiss the bill; and that in pursuance of the agreement a decree was,

[1] Comrs. *v.* Block, 99 U. S. 686. A judgment that negotiable bonds are invalid is not binding upon strangers who are *bona fide* holders for value before maturity. Stalleup *v.* Tacoma, 13 Wash. 141, 52 Am. St. R. 25; Board *v.* Texas, etc., R. Co., 46 Tex. 316; Chilton *v.* Town of Gratton, 82 Fed. R. 873; Hoppock *v.* Chambers, 96 Mich. 509. But see *post*, § 529.

[2] Wilder *v.* Board of County Comrs., 41 Fed. R. 512; Harshman *v.* Knox Co., 122 U. S. 306. See, also, Freeman on Judgments, §§ 256, 257.

by consent of parties entered in the minutes of the court reciting the agreement and decreeing according to its terms. Such decrees, when pleaded as *res adjudicata*, are not binding, and a corporation can not by such process either ratify its void bonds or preclude itself from making its defense when sued upon the coupons by a subsequent holder for value.[1]

§ 513. **When a municipality is not estopped to plead an overissue of bonds.**—In a suit to recover on certain coupons past due on bonds issued by a municipality it was held by the circuit court of appeals of the Fifth circuit that one who buys municipal bonds at one time in such number as to exceed in amount the limit of the issue authorized by law is chargeable with notice, and the municipality is not estopped to plead an overissue.[2]

§ 514. **Presentation of claims, when not necessary before suit is brought.**—The statute of Nevada requiring presentation of claims and accounts to the county commissioners and county auditor for allowance and approval, applies only to unliquidated claims and accounts, not to bonds and coupons, nor to a judgment upon bonds and coupons; and such presentation is not necessary before an action on such a judgment can be maintained.[3]

[1] Kelley *v.* Town of Milan, 21 Fed. R. 842, 127 U. S. 139, 8 Sup. Ct. R. 1101; Marsh *v.* Fulton Co., 10 Wall. 676; Lewis *v.* City of Shreveport, 108 U. S. 282; Ottawa *v.* Cary, 108 U. S. 110; Northern Bank *v.* Porter Township Trustees, 110 U. S. 608; Stimpson *v.* Railroad Co., 10 How. 329; Manhattan Life Ins. Co. *v.* Broughton, 109 U. S. 121; Homer *v* Brown, 16 How. 354; Gould *v.* Evansville, 91 U. S. 526; Merritt *v.* Campbell, 47 Cal 543; Ellis *v.* Mills, 28 Tex. 584; Fletcher *v.* Holmes, 25 Ind. 458; Gates *v.* Preston. 41 N. Y. 113; Board of Liquidation *v.* Louisville, etc., Railroad Co., 109 U. S. 221; Hillsboro *v.* Nichols, 46 N. H. 379; Rollins *v.* Henry, 84 N. Car. 569; Martin *et al. v.* Gray, 5 Okla. 188.

[2] Francis *v.* Howard Co., 54 Fed. R. 4 C. C. A. 460, 487, 50 Fed. R. 44, affirmed; Marcy *v.* Township of Oswego, 92 U. S. 637; School District *v.* Stone, 106 U. S. 183; Chaffee Co. *v.* Potter, 142 U. S. 355; Dixon Co. *v.* Field, 111 U. S. 83; Sutliff *v.* Lake Co. Comrs., 147 U. S. 230.

[3] Vincent *v.* Lincoln Co., 62 Fed. R. 705. See, also, County of Greene *v.* Daniel, 102 U. S. 187; Shinbone *v.* Randolph County, 56 Ala. 183.

§ 515. **When parol testimony not admissible.**—The constitution and statutes of Texas, relating to debts of municipal corporations, prohibit such corporations from contracting debts, unless payment thereof is provided for by taxes to be assessed and collected annually. In an action on certain county bonds it appeared that the record of the proceedings of the county commissioners' court, required by law to be kept, though not required to be made up in strict chronological order, contained a record of such an order, in due form, providing for the issue of the bonds and for taxes to pay the same, which order purported to have been passed at a meeting held before the issue of the bonds, but was entered among the proceedings of another meeting, held after the bonds were issued. It was held by the United States circuit court of appeals that, as against the *bona fide* holder of the bonds for value, parol evidence could not be received to show that the order was not passed at the time it purported to be, but at the time when it was entered on the record, after the issue of the bonds.[1]

§ 516. **Recovery upon lost bonds.**—In a suit brought against a municipality upon certain of its bonds, the plaintiff was held entitled to recover where the complaint averred that the bonds were lost before maturity, and while they were held and owned by the plaintiff, and an offer was made to indemnify the municipality against loss on account of the inability of the plaintiff to present or return the bonds for cancellation, and an approved bond was brought into court for the indemnity of the municipality.[2]

§ 517. **Limitation of action on municipal warrants under the Kansas statutes.**—An action on a municipal warrant issued in payment for a sidewalk built by a city under the Kansas statute, is barred in five years after its maturity; and an acknowl-

[1] Mathis *v.* Runnels Co., 66 Fed. R. 494, 13 C. C. A. 600. See, also, Whittaker *v.* The County of Johnson, 10 Iowa 161.

[2] City of Bloomington *v.* Smith, 123 Ind. 41; Depew *v.* Wheelan, 6 Blackf. 485; Elliott *v.* Woodward, 18 Ind. 183; National State Bank *v.* Ringel, 51 Ind. 393; Gregg *v.* Union Co. Nat'l Bank, 87 Ind. 238; Fales *v.* Russell, 16 Pick. 315; Thayer *v.* King, 15 Ohio 242; Smith *v.* Rockwell, 2 Hill 482.

edgment which can have effect to remove the bar of the statute must recognize a subsisting liability on the warrant, and be made to the holder thereof or to his representative.[1]

Where a county owes a debt in writing which has been due for more than five years, but the county has paid the interest on such debt up to within less than five years, and has otherwise, within that time, in writing, repeatedly acknowledged its own liability to pay such debt, the five years' statute of limitation is not a bar in an action for the recovery of such debt.[2]

A township warrant is such a promise in writing that an action may be brought thereon by such a township in Kansas at any time within five years from the date of its issue.[3]

§ 518. **Statute of limitation as affecting county warrants under the Nebraska statute.**—The statute of Nebraska provides that "An action upon a special or any agreement, contract, or promise in writing, or foreign judgment, can only be brought within five years after the cause of action shall have accrued." This provision applies as well to actions where counties or other municipal corporations are parties as between private persons. The law recognizes no distinction in suitors, but is the same rule unto all. But in construing this statute the supreme court of Nebraska held that the statute of limitations does not limit the time within which proceedings to enforce the payment of county warrants shall be instituted. The court based its decision upon the following grounds: First. The whole course of legislation shows that county warrants are not within the statute. Second. The cause of action upon a county warrant does not accrue when the warrant is issued, but only when the money for its payment is collected, or time sufficient for the collection of the money has elapsed to enable

[1] King *v.* City of Frankfort, 2 Kan. Ct. of App. 530; Walnut Tp. *v.* Jordan, 38 Kan. 562; Hanson *v.* Towle, 19 Kan. 273; Elder *v.* Dyer, 26 Kan. 604; Sibert *v.* Wilder, 16 Kan. 176; Schmucker *v.* Sibert, 18 Kan. 104; Clawson *v.* McCune's Adm'r, 20 Kan. 337.

[2] Comrs. of Leavenworth Co. *v.* Higgenbotham, 17 Kan. 62.

[3] Walnut Tp *v.* Jordan, 38 Kan. 562; Comrs. of Leavenworth *v.* Keller, 6 Kan. 510.

the county to levy and collect it in the mode provided under the revenue law.[1]

But in an action founded upon a school district warrant or order, it was conceded that the warrant became due more than five years prior to the commencement of the suit, and that if the statute of limitations applied to school district warrants, the action could not be maintained. It was held by the supreme court that the legal maxim "Lapse of time does not bar the right of the state," can only apply in favor of the sovereign power, and has no application to school districts or other municipal corporations deriving their power from the sovereign. The statute of limitations runs for or against school districts in the same manner as it does for or against individuals.[2]

§ 519. **When statute of limitation begins to run on municipal warrants under the statutes of Arkansas.**—Municipal warrants issued to pay for public works in Arkansas are not negotiable instruments, in the full sense of the law merchant, but are mere *prima facie* evidence of a valid claim, and the statute of limitations begins to run against them upon delivery. A suit can, therefore, be maintained on such warrants, whether an appropriation adequate to pay them has been made or not.[3]

Where a county may be sued on its ordinary warrants and compelled by mandamus to levy a tax to pay them, the statute

[1] Brewer *v.* Otoe Co., 1 Neb. 373. See, also, Lincoln Co. *v.* Luning, 133 U. S. 529, 10 Sup. Ct. R. 363.

[2] May *v.* School District, 22 Neb. 205. The case of Brewer *v.* Otoe Co., 1 Neb. 373, commented upon and distinguished; Woods on Limitations, § 53; City of Cincinnati *v.* Evans, 5 Ohio St. 594; Lane *v.* Kennedy, 13 Ohio St. 42; Cincinnati *v.* Church, 8 Ohio 298; School Directors *v.* Goerges, 50 Mo. 194; Kennebunkport *v.* Smith, 22 Me. 445; Clements *v.* Anderson, 46 Miss. 581; Evans *v.* Erie Co., 66 Pa. 222; County of St. Charles *v.* Powell, 22 Mo. 525; Callaway Co. *v.* Nolley, 31 Mo. 292; Abernathy *v.* Dennis, 49 Mo. 468; Pemental *v.* City of San Francisco, 21 Cal. 351; Clark *v.* Iowa City, 20 Wall. 583; De Cordova *v.* Galveston, 4 Tex. 470; Underhill *v.* Trustees, 17 Cal. 172; Baker *v.* Johnson Co., 33 Iowa 151; 2 Dillon on Munic. Corp. 668.

[3] Thompson *v.* Searcy Co., 57 Fed. R. 1030 6 C. C. A. 674; Wall *v.* County of Monroe, 103 U. S. 74; Crudup *v.* Ramsey, 54 Ark. 168, 15 S. W. R. 458.

of limitations begins to run against such warrants from the date of their issue.[1]

§ 520. **Statute of limitations affecting municipal warrants under the Missouri statute.**—The revised statute of Missouri, of 1889, providing that municipal warrants not presented for payment within five years of their date, or, being presented within that time, and protested for want of funds, and not presented again within five years after funds are set apart for payment thereof, shall be barred, prescribes a special limitation for actions on such warrants, within the provisions of the statute, which provides that the limitation of ten years prescribed by said statute for an action on any writing for the payment of money shall not extend to any action which shall be otherwise limited by any statute.[2]

§ 521. **The doctrine of the statute of limitations as affecting bonds and coupons by the supreme court of the United States.**—A case arose in the supreme court of the United States from Wisconsin, in which this subject was under consideration by the court. The statute of Wisconsin prescribes that actions upon sealed instruments are not barred until the lapse of twenty years, whilst actions upon simple contracts are barred in six years. An action was brought upon coupons when more than six years, but less than twenty years, had elapsed after their maturity. The court held that the coupons were substantially copies of the bond in respect to the interest, and were given to the holder of the bond for the purpose of enabling him to collect the interest at the time and place mentioned, without the trouble of presenting the bond every time the interest became due, and to enable him to realize the interest when negotiating the coupons in business transactions; and that the coupons,

[1] Golman *v.* Conway Co., 10 Fed. R. 888; Baker *v.* Johnson Co., 33 Iowa 151; Justices *v.* Orr, 12 Ga. 137; Carrol *v.* Board of Police, 28 Miss. 38; Shirk *v.* Pulaski Co., 4 Dillon 209. But see, as to the rule where warrants or bonds and coupons are payable only out of a special fund, Lincoln Co. *v.* Luning, 133 U. S. 529, 10 Sup. Ct. R. 363; Freehill *v.* Chamberlin, 65 Cal. 603, 4 Pac. R. 646.

[2] Knox Co. *v.* Morton, 68 Fed. R. 787, 15 C. C. A. 671, reversing Morton *v.* Knox Co., in 65 Fed. R. 369.

partaking of the nature of the bonds, which were of higher security than simple contracts, were not barred by a lapse of time short of twenty years.[1]

A similar case arose in Kentucky, where the statute prescribed fifteen years as the limitation for actions on bonds, and only five years for actions on simple contracts. The action was upon coupons of certain bonds issued by the city, and the city pleaded the statute of limitations of five years, but the court held that the bonds were specialties, not falling within the period prescribed; that suits on bonds might be maintained if commenced within fifteen years after the cause of action accrued, and that a suit upon a coupon was not barred by the statute unless the lapse of time was sufficient to bar also a suit upon the bond, as the coupon, if in the usual form, was but a repetition of the bond in respect to the interest for the period of time therein mentioned, and partook of its nature.[2]

It is evident, from an examination of the cases cited, that it was not the intention of the court to decide that an action upon a coupon detached from the bond, and negotiated to other parties, was not subject to the same limitations as an action upon the bond itself, much less to hold that the coupons remained a valid and existing cause of action, not only for the period prescribed for actions on the bond after its maturity, but for the additional period intervening between the maturity of the coupon and the maturity of the bond, however great that might be. The question before the court in those cases was only whether the time the statute ran against the coupons was the longest or shortest period—was it six or twenty years in the Wisconsin case, or was it five or fifteen years in the Kentucky case? And the court held that the statute ran for the longest period, because the coupons partook of the nature of the bonds, and the statute ran for that period as to them.

Most of the bonds of municipal bodies and private corpora-

[1] City *v.* Lamson, 9 Wall. 477; Huey *v.* Macon County, 35 Fed. R. 481. So, in South Dakota county warrants are required by statute to have the county seal thereon, and the statute of limitations is twenty years. Heffleman *v.* Pennington County, 3 S. Dak. 162, 52 N. W. R. 85.

[2] City of Lexington *v.* Butler, 14 Wall. 282. See, also, Meyer *v.* Porter, 65 Cal. 67.

tions in this country are issued in order to raise funds for works of large extent and cost, and their payment is, therefore, made at distant periods, not unfrequently beyond a quarter of a century. Coupons for the different installments of interest are usually attached to these bonds, in the expectation that they will be paid as they mature, however distant the period fixed for the payment of the principal. These coupons, when severed from the bonds, are negotiable and pass by delivery. They then cease to be incidents of the bonds and become, in fact, independent claims; they do not lose their validity, if for any cause the bonds are canceled or paid before maturity; nor their negotiable character; nor their ability to support separate actions and the amount for which they are issued draws interest from its maturity. They, then, possess the essential attributes of commercial paper. This is the settled doctrine of the supreme court of the United States.[1]

Every consideration, therefore, which give efficacy to the statute of limitations when applied to actions on the bonds after their maturity, equally requires that similar limitations should be applied to actions upon the coupons after their maturity. Coupons, when severed from the bonds to which they were originally attached, are in legal effect equivalent to the separate bonds for the different installments of interest. The like action may be brought upon each of them, when they respectively become due, as upon the bond itself when the principal matures; and to each action—to that upon the bond and to each of those upon the coupons—the same limitation must, upon principle apply. All statutes of limitations begin to run when the right of action is complete and it would be exceptional and illogical to hold that the statute sleeps with respect to claims upon detached coupons, whilst a complete right of action upon such claims exists in the holder. And, therefore, the statute of Iowa, which extends the same limitations upon all contracts, sealed or unsealed, began to run against the coupons from their respective maturities.[2]

In other words, while the length of the period of limitation

[1] Thompson *v.* Lee Co., 3 Wall. 327; Aurora City *v.* West, 7 Wall. 82.

[2] Clark *v.* Iowa City, 20 Wall. 583.

is the same, the statute begins to run against a detached coupon from its own maturity and an action upon it may, therefore, be barred before an action upon the bond which matures later.[1]

§ 522. **Interest coupon barred by the statute of limitations can not be recovered with the principal debt.**—When an installment of interest due on a municipal bond can not be recovered by a suit on the coupons by reason of lapse of time since the coupon matured, the same installment of interest can not be recovered along with the principal debt in a suit on the bonds.[2]

§ 523. **Coupons, when barred by the statute of limitations under the New York code.**—The code of civil procedure of the state of New York provides that "a contract, obligation or liability express or implied, except a judgment or sealed instrument," must be brought within six years after the cause of action has accrued; but actions upon sealed instruments may be brought within twenty years. In an action upon detached coupons the defendant pleaded the six years' statute of limitations and asserted that it was a valid defense to the coupons upon which the action was founded. The United States circuit court for the northern district of New York held that coupons detached from bonds are substantially copies of and partake of the nature of the bonds from which they are detached, and the statute of limitations which applies to them is the one which relates to sealed instruments. Hence, they are not barred by lapse of time short of twenty years.[3]

[1] Amy *v.* Dubuque, 98 U. S. 470; Koshkonong *v.* Burton, 104 U. S. 668; Huey *v.* Macon County, 35 Fed. R. 481; 2 Elliott R. R., § 486.

[2] Griffin *v.* Macon Co., 36 Fed. R. 885; Huey *v.* Macon Co., 35 Fed. R. 481; Bush *v.* Stowell, 71 Pa. St 208; Burnham *v.* Brown, 23 Me. 400; Estabrook *v.* Moulton, 9 Mass. 258; Heywood *v.* Perrin, 10 Pick. 228. *Vide* Grafton Bank *v.* Doe, 19 Vt. 463; Henderson *v.* Hamilton, 1 Hall (N. Y.) 314; Ferry *v.* Ferry, 2 Cush. (Mass.) 92; City *v.* Lamson, 9 Wall. 477; City of Lexington *v.* Butler, 14 Wall. 282; Clark *v.* Iowa City, 20 Wall. 583.

[3] Kershaw *v.* Town of Hancock, 10 Fed. R. 541; City *v.* Lamson, 9 Wall. 477; City of Lexington *v.* Butler, 14 Wall. 282; Clark *v.* Iowa City, 20 Wall. 583; Amy *v.* Dubuque, 98 U. S. 470.

§ 524. **Unaccepted offer of the acknowledgment of a debt by municipality as affecting the statute of limitations.**—In an action on coupons of municipal bonds, an offer by the municipality within the statutory period of limitations, to compromise its bonds at a specified percentage, which was declined by the holders of bonds in suit, although accepted by the holders of its other bonds, is not a promise to pay or an acknowledgment of the debt which will interrupt the running of the statute of limitations.[1]

§ 525. **Running of the statute of limitations upon an implied promise by municipality to repay money received for void bonds.**—An action upon an implied promise by a municipal corporation to repay money received for void municipal bonds accrues at the time the payment is made, and not from the time the bonds are adjudged void or from the discovery of his mistake by plaintiff, in the absence of fraudulent concealment by defendant, or at the time of demand. Though illegal bonds of a municipal corporation be regarded as voidable only at the will of the corporation, an action as for money had and received is barred by the statute limiting actions on implied promises to five years, where more than five years before the action was brought the municipality refused to pay interest thereon, and pleaded in an action thereon that they were void, though it was stipulated in that action that the suit might be continued till decisions in another suit involving the validity of similar bonds, as by the plea of *ultra vires* plaintiff could abandon his suit and sue on the implied promise.[2]

§ 526. **Statute of limitations, when a bar to an action on bonds for money had and received.**—Where a municipal cor-

[1] Edwards *v.* Bates Co., 55 Fed. R. 436; Chambers *v.* Rubey, 47 Mo. 99; Keeton's Heirs *v.* Keeton's Admr., 20 Mo. 530; Cook *v.* The Continental Insurance Co., 70 Mo. 610; Smith *v.* Shell, 82 Mo. 15; Kansas City, etc., Railroad Co. *v.* Farrell, 76 Mo. 183.

[2] Morton *v.* City of Nevada, 41 Fed. R. 582, 52 Fed. R. 350; Tapley *v.* McPike, 50 Mo. 589; Palmer *v.* Palmer, 36 Mich. 487; Lunt *v.* Wrenn, 113 Ill. 168; Blethen *v.* Lovering, 58 Me. 437; Jones *v.* School District, 26 Kan. 490. *Vide* Morrison *v.* Mullin, 34 Pa. St. 12; Collins *v.* Thayer, 74 Ill. 138; Weaver *v.* Leiman, 52 Md. 708; Chancellor *v.* Wiggins, 4 B. Monroe 201. But see Ætna Life Ins. Co. *v.* Lyon County, 82 Fed. R. 929.

poration had issued certain bonds, which were placed in the hands of an agent to negotiate, and the agent sold the bonds and absconded with the proceeds, the purchaser of part of the bonds afterwards brought suit on them against the corporation, which defended the suit on the grounds that the bonds were issued without authority of law, and this defense was sustained. The bondholder then made a demand upon the corporation for the money paid its agent for the bonds, or for the sum which the agent had recovered from the defaulting agent, in case its liability were held to be limited to the amount it had actually received, and such demand being refused, filed a bill against the corporation to obtain the relief. It was held that the accruing of plaintiff's right of action was not postponed after the making of his demand, but the same arose at least as soon as the corporation by interposing its answer in the action on the bonds, denied its liability and more than six years having elapsed since that time, during which plaintiff was at liberty to assert his claim in his action at law, his right was barred.[1]

§ 527. **Statute of limitations, when a bar to an action on an implied or constructive trust.**—In case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in suits in equity as in actions at law; and the bar of the statute begins to run when the cause of action has accrued. Thus, a municipal corporation in Indiana entrusted certain bonds to one W. to sell. W. sold the bonds and embezzled the proceeds. The corporation afterwards recovered $6,988, from a bank which held the same for W. More than six years after the recovery of this money, one M., a holder of some of the bonds sold by W. which had been adjudged to be invalid, brought suit against the corporation to charge it as trustee of the money recovered from W.'s bank on the ground that such

[1] Merrill *v.* Town of Monticello, 27 Fed. R. 462, 18 C. C. A. 636. Distinguished in Ætna Life Ins. Co. *v.* Lyon County, 82 Fed. R. 929, in which it was held that under the different circumstances of the latter case, the statute of limitations did not begin to run until the time designated in the bonds for payment.

money equitably belonged to the purchaser of the bonds. It was held by the United States circuit court for the district of Indiana that the statute of limitations was a bar to the suit to charge the corporation under such implied or constructive trust.[1]

§ 528. **Actions, when barred on railway aid bonds.**—In a suit upon certain railroad aid bonds in the state of Kansas, it appeared that on the 13th of October, 1870, the board of county commissioners of Bourbon county subscribed for $150,000 of the capital stock of the Fort Scott and Allen County Railroad Company, of which the Fort Scott, Humboldt and Western Railroad Company was the successor. Upon the completion of the roadbed of the railroad company from Fort Scott to the western line of Bourbon county on or before the first day of July, 1872, the bonds of the county were to be issued to the railroad company in payment of the subscription. On the 6th day of June, 1871, S. entered into a written contract with the railroad company to grade and complete the roadbed in Bourbon county, and in payment thereof was to receive from the railroad company $125,000 of the bonds of that county. S. had no contract with the county, his contract being a personal one with the railroad company. S. performed his contract with the railroad company prior to June 30, 1872, and was entitled to payment from the railroad company under the terms of the contract. After the roadbed was completed in June, 1872, the railroad company demanded of Bourbon county the bonds in payment of the subscription. The county refused to issue or deliver the bonds, and soon after burned them. It was held by the supreme court of Kansas that as the railroad company completed the contract with Bourbon county on or before June 30, 1872, and had demanded the bonds on that date, its cause of action then accrued, and under the statute of limitations its action for the bonds or the recovery of the same was barred in five years. It was further held that so long as S. had no legal or equitable assignment of the bonds from the county to the railroad company, and so long as there was no privity between

[1] Merrill *v.* Town of Monticello, 66 Fed. R. 165.

him and the county he had no right or cause of action against the county for the bonds. It was also held that until S. had obtained a judgment against the railroad company, or a legal or equitable assignment of its claim for the bonds, he could not maintain any action against the county for the bonds, and joining the railroad company as defendant in such an action gave him no additional right or cause of action against the county.[1]

§ 529. **When a judgment is res adjudicata.**—Where a judgment for the defendant was rendered on a demurrer to a petition in an action on the coupons of municipal bonds on the ground that the cause of action on the coupons was barred by the statute of limitations, such judgment was held to be *res adjudicata* between the parties, in a suit on the bonds, in which judgment was also demanded for the amount of the coupons.[2] So, it has been held that the holder of coupons cut from county bonds issued in satisfaction of a judgment is in privity with the judgment creditor and, in an action upon the coupons, may invoke every presumption and estoppel in support of his claim which the judgment creditor could have invoked if he had brought the action upon his judgment.[3] And a judgment in a suit brought by certain tax-payers on behalf of themselves and all others to enjoin the issuance of bonds is conclusive and binding upon all the tax-payers of the town, although they are not parties, so far as it determines the validity of the bonds and authorizes their issuance.[4]

So, where a judgment has been recovered against a county on its bonds and a mandamus has been issued to compel the

[1] Smith *v.* Comrs. of Bourbon Co., 43 Kan. 619; Tennent *v.* Battey, 18 Kan. 324; State Bank *v.* Magness, 11 Ark. 343; Meath *v.* Mississippi Comrs., 109 U. S. 268; Tiffin *v.* Leabo, 52 Mo. 49; Sidener *v.* Galbraith, 63 Ind 89.

[2] Edwards *v.* Bates Co., 55 Fed. R. 436; Bissell *v.* Spring Valley Tp., 124 U. S. 225; Gould *v.* Evansville, etc., Railroad Co., 91 U. S. 526; Lewis *v.* Brown Tp., 109 U. S. 162; Nesbit *v.* Riverside Independent District, 144 U. S. 610; Price *v.* Bonnifield, 2 Wyo. 80. But see *ante*, § 503.

[3] Board *v.* Platt, 79 Fed R. 567, 572.

[4] Stallcup *v.* Tacoma, 13 Wash. 141, 52 Am. St. R. 25; Harmon *v.* Auditor, 123 Ill. 122, 5 Am. St. R. 502. This is certainly true where a second suit is brought upon the same grounds presented and decided in the former suit.

levy of a tax to pay the same, the matter is *res adjudicata* and the validity of the bonds can not be questioned in a subsequent suit between the same parties.[1]

§ 530. **The right of mandamus, when barred by the statute of limitations.**—The right of mandamus to enforce the collection of a judgment against a municipality on its bonds is in the nature of, and is equally equivalent to, the statutory right of execution, and the right to prosecute the writ for such a purpose has been held limited to the same period of time within which execution may be sued out and a judgment against individuals.[2]

§ 531. **Statute of limitations, how affected by municipal officers evading service of process by resignation or otherwise.**—The general rule relating to statute of limitations is that the language of the statute must prevail, and no reason based on apparant inconvenience or hardship can justify a departure from it. The courts of equity, however, from an early day held that where one person had been injured by the fraud of another, and the facts constituting such fraud did not come to the knowledge of the person injured until some time afterward, the statute will not commence to run until the discovery of those facts, or until, by reasonable diligence, they might have been discovered.[3]

But the supreme court of the United States has held that a conspiracy of the officials and residents of the city to prevent service of process upon it, by the resignation of the mayor and by the secret meeting of the common council before qualifying and organizing, and by their immediately resigning their offices after the transaction of some necessary business, and the consequent inability to serve such process, does not

[1] Marion County *v.* Coler, 88 Fed. R. 59.

[2] United States *v.* Township of Oswego, 28 Fed. R. 55.

[3] Braun *v.* Sauerwein, 10 Wall. 218; Booth *v.* Warrington, 4 Brown P. C. 163; South Sea Co. *v.* Wymondsell, 3 P. Wms. 143; Hovenden *v.* Ld. Annesley, 2 Sch. & Lef. 607, 631, etc.; Blennerhassett *v.* Day, 2 Ball. & B. 104, 129; Mitf. Ch. Pl. Ed. Jeremy, 269; Blanchard Lim., 81; Wood Lim., § 58, p. 114, § 274, p. 586; Angell Lim., c. 18, 2d ed., p. 188.

furnish any excuse for not commencing the action within the time limited by law.

The courts can not create an exception to the operation of the statute of limitations not made by the statute itself, where the party designedly evades the service of process.

Although concealment of fraud has been held ground for suspending the statute of limitations, yet the evasion of service of process is not fraud in the legal sense of the term, and is no valid answer to the statutory bar.[1]

In an action brought upon certain municipal aid bonds, issued in pursuance of the statute, it was alleged, for the purpose of avoiding the statute of limitations, that for a certain period during the running of the statute on the bonds there was no officer of the municipal corporation, they having all resigned for the express purpose of evading service of summons, in order that no valid service could be made upon anybody. It was held by the United States circuit court for the district of California that, although all the officers of a municipality resign for the purpose of evading service of summons in a suit against such municipality, it will not prevent the statute of limitations from running.[2]

§ 532. **Statute of limitation as affecting municipal warrants.**—A case arose in the supreme court of the United States from the state of Nebraska in which this subject was under consideration by the court. It appeared that suit was brought to recover the amount due upon certain warrants of a county. The petition alleged, among other things, that the warrants had been presented to the county treasurer and payment thereon demanded. The county treasurer indorsed upon the warrant "not paid for want of funds." Afterwards the warrants were duly registered for payment. The answer set up as a defense that the causes of action did not accrue within five years next before the commencement of the suit. To this a demurrer was filed upon the ground that the answer did not state facts sufficient to constitute a defense, and "that by the

[1] Amy *v.* City of Watertown, 130 U. S. 320.

[2] Nash *v.* Eldorado Co., 24 Fed. R. 252.

statutes of Nebraska and the construction given thereunder by the court of Nebraska the statute does not run against a county warrant." This demurrer was overruled, and judgment rendered in favor of the county. The case was appealed to the supreme court of the United States and the judgment of the lower court was reversed on the ground that in Nebraska the statute for five years does not run against a county warrant. And that the cause of action upon such warrant did not accrue when the payment was refused. The court further held that in an action to recover the amount due upon warrants an answer that the cause of action did not accrue within five years next before the commencement of the suit does not state facts sufficient to constitute a defense.[1]

Chief Justice Waite said: "According to the rule established in Brewer *v.* Otoe County, the cause of action did not accrue when the payment was refused, 'but only when the money for its payment is collected, or time sufficient for the collection of the money has elapsed.' We can not say, as a matter of law, that this was more than five years before the commencement of the action."[2]

The supreme court of Iowa has held that the statute of limitations begins to run against a county warrant when it is presented to the proper authority and indorsed "not paid for want of funds."[3]

Where a town clerk has duly paid an order, and is entitled to credit for it at his next settlement, the statute of limitations begins to run, under the statutes of Iowa, at the date of such settlement.[4]

The supreme court of Texas has held that where the county commissioners' court passed an order that all warrants not registered under a certain act of the legislature should not be

[1] King Iron Bridge and Manufacturing Co. *v.* Otoe County, 124 U. S. 459; Chapman *v.* County of Douglass, 107 U. S. 348; Brewer *v.* Otoe County, 1 Neb. 373.

[2] King Iron Bridge and Manufacturing Co. *v.* Otoe County, 124 U. S. 459, 27 Fed. R. 800. See, also, Davis *v.* Board, 23 Neb. 262, 45 Pac. R. 982.

[3] Carpenter *v.* District Tp. of Union, 58 Iowa 335.

[4] Dewey *v.* Lins, 57 Iowa 235; Prescott *v.* Gonser, 34 Iowa 175.

paid, in an action brought more than four years after such order had been made, on a warrant issued before the order of said court, that in the absence of any knowledge of the order on the part of the holder of the warrant from any source, the statute of limitation was not set in operation against him.[1]

In a suit upon certain school bonds, it appeared that the county commissioners levied taxes on the taxable property in said school district for the purpose of paying the interest on said bonds, and to provide a sinking fund for the final redemption of the same; that such taxes were collected by the county treasurer and paid on said bonds within five years next before the commencement of said action. It was held that such payment was sufficient to take the bond upon which it was paid and endorsed out of the statute of limitations.[2]

§ 533. **Valid defense to an action upon certificates of indebtedness.**—In an action upon a certificate of indebtedness issued by a city, and signed by the mayor and clerk, the answer alleged that it was issued without authority, and delivered to the plaintiff without consideration; that the pretended consideration was under a contract with the company of which the mayor was a member; that the contract was fraudulent and void, and no consideration was ever received by the city, and the issue was in excess of the power of the city and in violation of the law; that the certificate was not issued in anticipation of a levy; that before it was issued, the city, through its city council and committee had anticipated a levy to the full extent authorized by law. It was held that the answer stating such facts was not demurrable as failing to state a valid defense.[3]

§ 534. **When holder of municipal bonds may recover interest on interest.**—Holders of municipal bonds issued under a statute which stipulated for the payment of interest semi-annually,

[1] Leach *v.* Wilson Co., 68 Tex. 353, 4 S. W. R. 613; De Cordova *v.* City of Galveston, 4 Tex. 470; Justices, etc., of Bibb Co. Court *v.* Orr, 12 Ga. 137; Cohen *v.* Carrol, 13 Miss. 38; Belleville Savings Bank *v.* Winslow, 30 Fed. R. 488; Logan *v.* County Court of Barton Co., 63 Mo. 336.

[2] School District *v.* Bank, 19 Neb. 89.

[3] Bangor Savings Bank *v.* City of Stillwater, 45 Fed. R. 544.

part only of the bonds having coupons therefor attached, and the semi-annual installments of interest not being paid when due, are entitled to recover interest upon all such semi-annual installments from the date they become due.[1]

§ 535. **Misappropriation of proceeds of bonds as a defense.**—As against the innocent purchaser for value, before maturity, of bonds issued by a city board of education, it is no defense that the board loaned nearly the entire proceeds of their sale to the city, for city warrants that were never paid and that can not be legally enforced.[2]

Neither is it a defense to such bonds, as against *bona fide* purchasers thereof, that the citizens and officers of a municipal corporation, with intention to use the proceeds of the bonds for an unlawful purpose, took the necessary steps to issue them for a lawful purpose, certified on the face of them that they were issued for such lawful purpose, and then appropriated the proceeds to an unlawful purpose.[3]

§ 536. **Burden of proof.**—When the pleadings involve an issue of *bona fides*, the burden of proof, as a rule, is upon the party who assails the possession.[4]

The logical and orderly mode of a trial when such an issue is raised would be this: The plaintiff, in order to sustain his claim, must first produce the bonds or coupons, if the

[1] Wilson *v.* Neal, 23 Fed. R. 129; Monnett *v.* Sturges, 25 Ohio St. 384; Cook *v.* Courtright, 40 Ohio St. 248. So, generally, coupons for interest draw interest after non-payment at maturity. Pana *v.* Bowler, 107 U. S. 529; Amy *v.* Dubuque, 98 U. S. 470; City of Jeffersonville *v.* Patterson, 26 Ind. 16; Ashuelot, etc., R. Co. *v.* Elliott, 57 N. H. 397.

[2] National Life Ins. Co. *v.* Board of Education, 62 Fed. R. 778, 10 C. C. A. 637.

[3] National Life Ins. Co. *v.* Board of Education, 62 Fed. R. 778, 10 C. C. A. 637; City of Huron *v.* Second Ward Sav. Bank, 86 Fed. R. 272, 277, and authorities there cited; West Plains Tp. *v.* Sage, 69 Fed. R. 943, 946; Maxcy *v.* Co. Court of Williamson Co., 72 Ill. 207; Town of Ontario *v.* Union Bank, 47 N. Y. Supp. 927; Nolan Co. *v.* State, 83 Tex. 182, 17 S. W. R. 823; Jones *v.* City of Camden, 44 S. Car. 319, 51 Am. St. R. 819; Anderson County Comrs. *v.* Beal, 113 U. S. 227. But see Doon Tp. *v.* Cummins, 142 U. S. 366, 12 Sup. Ct. R. 220; Ætna Life Ins. Co. *v.* Lyon County, 82 Fed. R. 929; Mitchell County *v.* City Nat. Bank (Tex.), 43 S. W. R. 880; Barnett *v.* Denison, 145 U. S. 135.

[4] Murray *v.* Lardner, 2 Wall. (U.S.) 110. But see Lytle *v.* Lansing, 147 U. S. 59, 13 Sup. Ct. R. 254.

pleadings have rendered their production essential. Their execution not being put in issue, this establishes the plaintiff's case, and establishes, presumptively, that he is holder for value before maturity without notice. The defendant then produces such proof as it may possess that the plaintiff is not holder for value; or that he received the security after maturity, or that he had notice of the defects alleged. If either of these points is established, the question of authority or irregularity is then open.[1]

But without proving either of these points, if the defendant proves strong circumstances of fraud in connection with the origin of the securities, as bribery of the officers charged with their issue, or any other gross fraud which attended their issuance, the burden of proof will be shifted upon the plaintiff to prove that he gave value for the paper, and that he obtained it before maturity, and unless he establishes these facts his case must fail.[2] Indeed, it is an elementary rule that if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover, must show that he is a holder for value, and mere possession, under such circumstances, is not enough.[3]

The petition in a suit upon municipal bonds, which contains no recital as to the law, etc., under which they were issued, must aver and prove that they were issued under legislative authority, and in the mode and for the purpose provided by law.[4]

When it appears that municipal bonds were fraudulently issued, the burden is cast on the holder to show that he is a holder in good faith and for value.[5]

In a suit by a railroad company to enforce the issuing of bonds by a municipality for its use, the burden of proof is upon the railroad company in Illinois to show affirmatively that

[1] Chambers Co. *v.* Clews, 21 Wall. 317.

[2] Smith *v.* Sac Co., 11 Wall. 139.

[3] Stewart *v.* Lansing, 104 U. S. 505.

[4] Hopper *v.* Town of Covington, 8 Fed. R. 777, 118 U. S. 148.

[5] Tracy *v.* Town of Phelps, 22 Fed. R. 634; Harding *v.* Brooks, 5 Pick. 244; Elwood *v.* Western Union Company, 45 N. Y. 549; Kavanagh *v.* Wilson, 70 N. Y. 177; Gildersleeve *v.* Landon, 73 N. Y. 609; Koehler *v.* Adler, 78 N. Y. 287.

the issue of the bonds was authorized by a vote of the people had pursuant to a law providing therefor, prior to the adoption of the present constitution, and the law under which the election is held must be substantially complied with, or the election will confer no authority.[1]

Where the record of the county board relating to the issue of county bonds to a railroad company contained no recital or finding showing the giving of notice of the election to vote on the proposition of a corporate subscription, and the county clerk, the custodian of the records of the county court, testified that he had made diligent and thorough search of the records and files of his office, and was unable to find any paper or record indicating that any notice of such election was ever given, it was held that as the burden of proof of the giving of notice of the election was upon the party asserting the validity of the bonds, such issue should have been found against him.[2]

§ 537. **How fraud must be pleaded.**—A general allegation that municipal bonds or warrants had been fraudulently issued is insufficient, as it merely states a conclusion of law and is, therefore, demurrable. Hence a declaration alleging that certain bonds were obtained by covin, fraud, and mismanagement on the part of a railroad company must set out the facts constituting fraud, covin, and false representation.[3]

[1] Chicago, etc., Railroad Co. *v.* Malory, 101 Ill. 583; Eddy *v.* The People, 127 Ill. 428; Town of Prairie *v.* Lloyd, 97 Ill. 179; Williams *v.* The People, 132 Ill. 574; Board, etc., of Jackson Co. *v.* Brush, 77 Ill. 59; People *v.* Jackson Co., 92 Ill. 441.

[2] Choisser *v.* The People, 140 Ill. 21.

[3] Mobile Savings Bank *v.* Board of Supervisors, 22 Fed. Rep. 580; Title *v.* Banner, 53 Miss. 578. This is in accordance with the general rule that the facts constituting the alleged fraud must be specifically pleaded. Hardy *v.* Brier, 91 Ind. 91; Jackson *v.* Myers, 120 Ind. 504; Cohn *v.* Goldman, 76 N. Y. 284; Dyke *v.* Doherty, — N. Dak. —, 69 N. W. R. 200; Bliss Code Pl., § 211; Foster Fed. Pr., § 69.

APPENDIX.

FORMS AND PRECEDENTS.

Municipal Bonds for General Purposes.

STATE OF TEXAS. UNITED STATES OF AMERICA. CITY OF BRENHAM.
No. —— CITY OF BRENHAM BONDS. $100.
BONDS FOR GENERAL PURPOSES, $15,000.

Twenty years after date, for value received, the city of Brenham promises to pay to bearer one hundred dollars, with interest at the rate of ten per cent. per annum from date, payable semi-annually, on the first days of September and March of each year, upon presentation of the proper coupon hereto annexed, both principal and interest payable at the office of the treasurer of the city of Brenham after the expiration of ten years from date hereof. This bond is authorized by an ordinance of the city of Brenham, approved June 7, A. D. 1879.

In witness whereof, The mayor and secretary of the city of Brenham hereunto set their hands and affix the seal of the city of Brenham, this 31st day of July, 1879. M. P. KERR, Mayor.

C. H. CARLISLE, City Secretary.

City of Brenham *v.* German-American Bank, 144 U. S. 173.

Form of ordinance providing for the issue and sale of municipal bonds.

AN ORDINANCE TO PROVIDE FOR THE ISSUE AND SALE OF FIFTEEN THOUSAND DOLLARS IN COUPON BONDS OF THE CITY, TO BORROW MONEY FOR GENERAL PURPOSES.

Be it ordained by the city council of the city of Brenham:

SECTION 1. That the mayor be, and is hereby, authorized and empowered to have printed coupon bonds of the city of Brenham to the amount of fifteen thousand dollars.

SEC. 2. Said bonds shall be three (3) of the denomination of one thousand dollars ($1,000.00), fourteen (14) of the denomination of five hundred dollars ($500.00), twenty-five (25) of the denomination of one hundred dollars ($100.00), and fifty of the denomination of fifty dollars ($50.00).

They shall be made payable to bearer twenty years after date, at the office of the treasurer of the city of Brenham, with interest from date until paid, at the rate of ten per cent. per annum, payable semi-annually, on the first days of September and March, at the office of the treasurer of the city of

Brenham; but the city shall have the right to redeem said bonds at any time after five years from date.

Sec. 3. Said bonds shall be dated and interest begin to run on the first day of ———, A. D. 18—, provided, that should any of said bonds be sold at a subsequent date, the amount of interest then due shall be indorsed as a credit on the coupons first due.

Sec. 4. Said bonds shall be signed by the mayor and countersigned by the city clerk, and the seal of the city shall be affixed, and they shall be numbered and registered as series 2, No. —, giving the number of the bond issued, commencing with No. 1.

Sec. 5. Coupons shall be attached to each of said bonds for each semi-annual installment of interest, which said coupon shall have printed thereto the signature of the mayor and the city clerk, and shall be received for general *ad valorem* taxes of the city.

Sec. 6. Said bonds shall be negotiated and sold by the mayor and finance committee of the city as the same may be required for general purposes, but in no case shall they be sold at a greater discount than five per cent., and the proceeds thereof shall be placed in the treasury of the city to the credit of the general fund.

Sec. 7. That there be, and is hereby, appropriated out of the general *ad valorem* tax of the city one-eighth of one per cent., or so much thereof as may be necessary, on the assessed value of the taxable property of the city, as a special interest and sinking fund with which to pay the interest on said bonds and liquidate the same, and the said fund shall be kept separate from the other funds of the city, and shall be used for no other purpose.

Sec. 8. That this ordinance go into effect and have force from and after its passage.

Approved June 7, 1879. M. P. Kerr, Mayor.

Attest: C. H. Carlisle, Secretary.

City of Brenham *v.* German-American Bank, 144 U. S. 173.

Form of Town Bonds.

No. 29. United States of America. $1,000.

State of Illinois, County of Ogle.

OREGON TOWN BOND.

Know all men by these presents, That the town of Oregon, in the county of Ogle and State of Illinois, is indebted to the Ogle and Carroll County Railroad Company in the full and just sum of one thousand dollars, which sum of money said town agrees and promises to pay on or before the first day of July, 1883, to the said Ogle and Carroll County Railroad Company, or bearer, with interest at the rate of seven per cent. per annum, payable annually, on the first day of July, at the office of the Farmers' Loan and Trust Company of New York, in the City of New York, upon the delivery of the coupons severally hereto annexed, for which payment of principal and interest, well and truly to be made, the faith, credit, and property of said town of Oregon are hereby solemnly pledged, under authority of an act of the general assembly of the

state of Illinois entitled An act to amend an act entitled An act to incorporate the Ogle and Carroll County Railroad Company, which said act was approved March 30, 1869.

This bond is one of a series, numbering from 21 to 60 inclusive, for $1,000 each, which bonds, so numbered, together with another series numbered from 1 to 20 inclusive, for $500 each, are the only bonds issued by said town of Oregon, under and by virtue of said act.

In witness whereof, The supervisor and town clerk of the said town of Oregon have hereunto set there hands, this thirty-first day of December, A. D. 1870.

FRED. H. MARSH, Town Clerk. E. S. POTTER, Supervisor.

CERTIFICATES.

AUDITOR'S OFFICE, ILLINOIS.

SPRINGFIELD, June 5, 1871.

I, Charles E. Lippincott, auditor of public accounts of the state of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled An act to fund and provide for paying the railroad debts of counties, townships, cities and towns, in force April 16, 1869.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[Seal.] C. E. LIPPINCOTT, Auditor, P. A.

The coupons are in the following form, varying as to the number of bond and date of payment:

STATE OF ILLINOIS, COUNTY OF OGLE:

The town of Oregon will pay to the Ogle and Carroll County Railroad Company, or bearer, seventy dollars, at the office of the Farmers' Loan and Trust Company of New York, in the city of New York, on the first day of July, 1873, on presentation, being one year's interest on bond No. 29.

F. H. MARSH, Clerk. E. S. POTTER, Supervisor.

APPLICATIONS.

To the Town Clerk of the Town of Oregon, in the County of Ogle and State of Illinois:

The undersigned, legal voters of the said town of Oregon, in the county and state aforesaid, do hereby make application to you, and request that an election shall be held in said town, under the provisions of an act of the general assemby of the state of Illinois, entitled An act to amend an act entitled An act to incorporate the Ogle and Carroll County Railroad Company, approved March 30, A. D. 1869, to determine whether said town shall, in its corporate capacity, make a donation to the said Ogle and Carroll County Railroad Company of the sum of forty thousand dollars in the bonds of said town, in such denominations as said company may designate, not less than one hundred dollars each, payable at the option of said town, within twenty years from the date of their issue, bearing interest from date at the rate of seven per cent. per annum, payable annually, and principal and interest payable at such place as said company may designate, to aid in the construction of the first division of said Ogle and Carroll County Railroad, said bonds not to be issued, dated or delivered until said company shall have completed said first division of said railroad, with a T rail weighing not less than forty-five

pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and Northwestern Railway to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, and shall have equipped the same with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight, nor until said company shall have released said town from all liabilities on account of donations heretofore voted, except a donation of ten thousand dollars voted by said town on the ninth day of December, A. D. 1869, said vote and donation of forty thousand dollars to be null and void, unless said first division of said railroad shall be completed and equipped as aforesaid, on or before the first day of January, A. D. 1871, but in case the same shall be so completed and equipped within the time aforesaid, and said company shall execute and deliver said release, then the said bonds to be delivered upon the demand of said company, and to bear date of the day of delivery.

And we request that immediate notice be given of such election, and that the same be held on the twenty-third day of June, A. D. 1870. Dated this twenty-fourth day of May, A. D. 1870.

ELECTION NOTICES.

Whereas, more than twenty legal voters of the town of Oregon, in the county of Ogle, and state of Illinois, have presented to me, clerk of said town, a written application requesting that an election be held in said town under the provisions of an act of the general assembly of the State of Illinois, entitled An act to amend an act entitled An act to incorporate the Ogle and Carroll County Railroad Company, approved March 30, A. D. 1869, to determine whether said town shall, in its corporate capacity, make a donation to the said Ogle and Carroll County Railroad Company, of the sum of forty thousand dollars in the bonds of the said town, in such denominations as said company may designate, not less than one hundred dollars each, payable at the option of said town, within twenty years from the date of their issue, bearing interest from date at the rate of seven per centum per annum, payable annually, and principal and interest payable at such place as said company may designate, to aid in the construction of the first division of said Ogle and Carroll County Railroad; said bonds not to be issued, dated or delivered until said company shall have completed said first division of said railroad, with a T rail weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and Northwestern Railway, to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, and shall have equipped the same with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight; nor until said company shall have released said town from all liability on account of donations heretofore voted, except a donation of ten thousand dollars voted by said town on the 9th day of December, A. D. 1869; said vote of forty thousand dollars to be null and void unless said first division of said railroad shall be completed and equipped within the time aforesaid, and said company shall execute and deliver said release, then the said bonds shall be delivered upon demand of said company, and to bear date of the day of delivery.

The inhabitants, legal voters of the said town of Oregon, are therefore hereby notified that an election will be held by the legal voters of said town, at the court-house in said town of Oregon, on Thursday the twenty-third day of June, A. D. 1870, at 9 o'clock in the forenoon of said day, for the object and purpose of voting upon and determining the matters and questions hereinbefore, and in said written application as set forth and contained.

Given under my hand at my office, in said town of Oregon, this 24th day of May, A. D. 1870.

F. H. Marsh, Town Clerk of said Town.

Town of Oregon *v.* Jennings, 119 U. S. 74.

School Bond.

No. — School Bond. $1,000.

City of Atchison, State of Kansas.

Know all men by these presents, That the city of Atchison, Kansas, for value received, is indebted to the bearer in the sum of one thousand dollars, which it promises to pay on the first day of January, A. D. 1884, at the National Park Bank in the city of New York, with interest at the rate of ten per cent. per annum, payable semi-annually on the first day of January and the first day of July of each year upon presentation at the said National Park Bank of the interest coupons hereto attached as they mature; the last installment of interest payable with this bond. This bond is issued under and by virtue of an act of the legislature of the state of Kansas, entitled An act to organize cities of the second class, approved February 28, 1868, and is secured by pledge of the school fund and property of said city of Atchison for the payment of the principal and interest thereof, as the same may become due.

Dated at Atchison, this 1st day of January, 1869.

(Signed) Jno. A. Martin,
President of the Board of Education.

Countersigned: W. F. Downs, Clerk.
Frank Smith, Treasurer.

Board of Education *v.* DeKay, 148 U. S. 591.

Form of Funding Bond and Coupon.

No. —. $1,000.

United States of America, County of Chaffee, State of Colorado.

Funding Bond.

(Series A.)

The county of Chaffee, in the state of Colorado, acknowledges itself indebted, and promises to pay to —— ——, or bearer, one thousand dollars lawful money of the United States, for value received, redeemable at the pleasure of said county after ten years, and absolutely due and payable twenty years from the date hereof, at the office of the treasurer of said

county, in the town of Buena Vista, with interest thereon at the rate of eight per cent. per annum, payable semi-annually on the first day of March and the first day of September in each year, at the office of the county treasurer aforesaid, or at the banking house of Kountze Brothers, in the city of New York, at the option of the holder, upon the presentation and surrender of the annexed coupons as they severally become due.

This bond is issued by the board of county commissioners of said Chaffee county, in exchange at par for valid floating indebtedness of said county, outstanding prior to August 31, 1882, under and by virtue of, and in full conformity with, the provisions of an act of the general assembly of the state of Colorado, entitled An act to enable the several counties in the state to fund their floating indebtedness, approved February 21, 1881, and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond. It is further certified that the total amount of this issue does not exceed the limit prescribed by the constitution of the state of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said county of Chaffee, voting on the question at a general election duly held in said county, on the seventh day of November, A. D. 1882.

The bonds of this issue are comprised in three series designated "A," "B" and "C," respectively; the bonds of series "A" being for the sum of one thousand dollars each, those of series "B" for the sum of five hundred dollars each and those of series "C" for the sum of one hundred dollars each. This bond is one of series "A."

The faith and credit of the county of Chaffee are hereby pledged for the punctual payment of the principal and interest of this bond.

In testimony whereof, The board of county commissioners of the said county have caused this bond to be signed by their chairman, countersigned by the county treasurer and attested by the county clerk under the seal of the county, this first day of December, A. D. 1882.

Attest: Chairman Board of County Commissioners.

———, County Clerk.

[County seal.]

Countersigned:

———, County Treasurer.

No. ——. (Coupon.) $——.

The County of Chaffee, in the state of Colorado:

Will pay the bearer ——— dollars at the office of the county treasurer, in the town of Buena Vista, or at the banking-house of Kountze Brothers, in the city of New York, on the first day of ———, being six months' interest on the funding bond.

No. ——, Series ——. E. B. Jones, County Treasurer.

Chaffee County *v.* Potter, 142 U. S. 355.

Form of Cass County, Missouri, Funding Bond and Coupon.

No. 38. THE STATE OF MISSOURI. $500.

CASS COUNTY FUNDING BOND. TEN PER CENT., SEMI-ANNUALLY.

Issued by the order of the county court, under and by virtue of the power and authority conferred by an act of the general assembly of the state of Missouri, entitled An act to enable counties, cities and incorporated towns to fund their respective debts, passed and approved March 24, 1868.

Know all men by these presents, That the county of Cass, in the state of Missouri, acknowledges itself indebted to, and hereby promises to pay, the bearer hereof, for value received, at the banking house of Northrup & Chick, in the city and state of New York, $500, three years after the date hereof, with interest thereon from date, at the rate of ten per cent. per annum, payable semi-annually, on the second days of April and October of each year, on the presentation and delivery at said banking house of the coupons hereto attached.

In testimony whereof, The said county of Cass has executed this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same, and affixing hereto the seal of said court.

Done at the court-house, in the city of Harrisonville, in said county, on the first day of October, 1871.

[L. S.] JEHIEL C. STEVENSON,
Presiding Justice of the County Court of Cass County, Mo.
C. H. DORE,
Clerk of the County Court of Cass County, Mo.

By S. J. JONES, D. C.

(Coupon.)

$25. HARRISONVILLE, Cass Co., Mo.

The county of Cass, state of Missouri, acknowledges itself to owe, and promises to pay to the bearer $25 on the second day of October, 1874, at the banking house of Northrup & Chick, in the city and state of New York, being the interest on funding bond No. 38. C. H. DORE, Clerk.

By S. J. JONES, D. C.

County of Cass *v.* Shores, 95. U. S. 375, 376.

Form of Township Bond and Coupon.

$500. BOND OF BURLINGTON TOWNSHIP. No. 1.

COUNTY OF COFFEY, STATE OF KANSAS. UNITED STATES OF AMERICA.

Burlington township in the county of Coffey, State of Kansas, promises to pay John S. Stow, or bearer, the sum of $500, on the third day of December, A. D. 1877, and interest thereon at the rate of ten per cent. per annum, payable semi-annually, upon presentation of the coupons therefor, hereto annexed; both principal and interest payable at the banking house of Northrup & Chick, in the city of New York.

This bond is one of an issue of $8,000, made for the purpose of aiding internal improvements in said township, and in pursuance of an act of the legis-

lature of the state of Kansas, entitled An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith, approved March 2, 1872.

In testimony whereof, The township trustee, clerk and treasurer have caused this bond to be issued, duly signed, attested and countersigned, this third day of December, A. D. 1872. H. R. Flook, Trustee.

Attest: G. N. McConnell, Clerk.

Countersigned: H. L. Jarboe, Treasurer.

$25.00. No. 3.

The Treasurer of Burlington Township, Coffey County, Kansas, will pay to bearer twenty-five dollars, at the banking house of Northrup & Chick, in the city of New York, on the third day of June, A. D. 1874, for six months interest on bond No. 1, issued on the third day of December, A. D. 1872.

Attest: G. N. McConnell, Township Clerk.
H. R. Flook, Township Trustee.

Burlington *v.* Beasley, 94 U. S. 310.

Form of Township Bridge Bond.

No. —. Oxford Township Bridge Bond. $500.

The township of Oxford in the county of Sumner and state of Kansas hereby promises to pay to —— ———, or bearer, the sum of $500, on the fifteenth day of April, A. D. 1882, with interest thereon at the rate of ten per cent. per annum, payable semi-annually, on the fifteenth day of October and April of each year, upon the presentation of the coupons therefor hereto attached. Both principal and interest payable at the American Exchange National Bank, in the city of New York.

This bond is one of an issue of $10,000 made for the purpose of aiding in the building of a bridge across the Arkansas river at the town of Oxford, in the county of Sumner and state of Kansas, and in pursuance of an act of the legislature of the state of Kansas, entitled An act authorizing the trustee, treasurer and clerk, or any two of them of the township of Oxford, in the county of Sumner and state of Kansas, to subscribe for stock in the Oxford Bridge Company to the amount of $10,000, to aid in the construction of a bridge across the Arkansas river at Oxford, in said county and state, and to issue the bonds of said township in payment therefor, approved March 1, 1872, and in pursuance of a vote of the qualified electors of said township, had at an election held therein, on the eighth day of April, A. D. 1872, which said election resulted in a majority of 112 in favor of issuing said bonds in a total vote of 140.

The faith of said township and the receipts for toll of said bridge are pledged to the payment of this bond and interest.

In testimony whereof, The township trustee, clerk and treasurer of said

township have caused this bond to be issued, duly certified, attested and countersigned, this fifteenth day of April, A. D. 1872.

GEORGE T. WALTON, Trustee.

Attest: JOHN H. FOLKS, Clerk.
Countersigned: T. E. CLARK, Treasurer.

McClure *v.* Township of Oxford, 94 U. S. 430.

Forms of Internal Improvement Bonds and Coupons.

UNITED STATES OF AMERICA, STATE OF NEBRASKA.

It is hereby certified that Fremont precinct, in the county of Dodge, and state of Nebraska, is indebted unto the bearer in the sum of $1,000, payable on or before twenty years after date with interest at the rate of ten per cent. per annum from date. Interest payable annually on the presentation of the proper coupons hereto annexed. Principal payable at the office of the county treasurer, in Fremont, Dodge county, Nebraska. Interest payable at the Ocean National Bank, in the city of New York.

This bond is one of a series issued in pursuance of and in accordance with a vote of the electors of said Fremont precinct, at a special election held on the eleventh day of November, A. D. 1870, at which time the following proposition was submitted:

Shall the county commissioners of Dodge county, Nebraska, issue their special bonds on Fremont precinct, in said county, to the amount not to exceed $50,000, to be expended and appropriated by the county commissioners, or as much thereof as is necessary, in building a wagon bridge across the Platte river, in said precinct, said bonds to be made payable on or before twenty years after date, bearing interest at the rate of ten per cent. per annum, payable annually, which proposition was duly elected, adopted and accepted by a majority of the electors of said precinct voting in favor of the proposition.

And whereas, The Smith Bridge Company, of Toledo, Ohio, have entered into a contract with said county commissioners to furnish the necessary materials and to build and construct said bridge referred to in the foregoing proposition; therefore, this bond, with others, is issued in pursuance thereof, as well as under provisions of an act of the legislature of the state of Nebraska, approved February 15, A. D. 1869, entitled An act to enable counties, cities and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvements in this state, and to legalize bonds already issued for such purposes.

In witness whereof, We, the said county commissioners of said Dodge county, have hereunto set our hands, this first day of September, A. D. 1871.

(Signed and sealed by the county commissioners.)

Comrs. of Dodge Co. *v.* Chandler, 96 U. S. 205.

Precinct Bond.

No. 43. UNITED STATES OF AMERICA. $500.

DATED JULY 1, 1875.

COUNTY OF CUMING, STATE OF NEBRASKA: (WEST POINT PRECINCT BOND.)

Know all men by these presents, That the West Point precinct, in the county of Cuming and state of Nebraska, acknowledges itself indebted to the bearer hereof in the sum of $500 for value received, which said sum the West Point precinct promise and agree to pay to the bearer hereof at the National Park Bank, in the city of New York, on the first day of July *Anno Domini* 1895, and also interest thereon at the rate of ten per cent. per annum semi-annually, on the first days of January and July in each and every year ensuing the date hereof, on presentation of the annexed coupons or interest warrants as they severally fall due, at the National Park Bank, in the city of New York, in lawful money of the United States.

This bond is one of a series of sixty bonds of $500 each, amounting in the aggregate to $30,000, issued by the West Point precinct, of Cuming county, and state of Nebraska, as authorized by a vote of its legal voters and in accordance with chapter 35, Revised General Statutes, approved February 15, 1869, and an act setting aside the revenue arising from the taxation of works of internal improvements to pay the bonds issued to construct or complete the same.

These bonds are issued to aid the West Point Manufacturing Company in improving the water-power of the Elkhorn river for the purpose of propelling public grist-mills and other works of internal improvement of a public nature, in said West Point precinct. To secure the payment of the principal and interest of said bonds, the annual revenue and all the taxable property of said West Point precinct is pledged.

In testimony whereof, The board of county commissioners of Cuming county, state of Nebraska, by its chairman, attested by its clerk, who has affixed thereto the seal of the said county, at the clerk's office in West Point, in the said county, this first day of July, A. D. 1875.

C. L. SIECKE, Chairman.
THOMAS ROEH, Clerk.

(Cuming County Seal, Nebraska.)

Each coupon was in the following form:

$25.00. $25.00.

The West Point precinct, Cuming county, state of Nebraska, will pay the bearer $25, at the National Park Bank, in the city of New York, on the first day of July, 1877, on bond No. 43.

No. 43. THOMAS ROEH, Clerk.

Blair *v.* Cuming Co., 111 U. S. 363.

Forms of Railway Aid Bonds, Coupons and State Officers' Certificate.

No. ——. COUNTY OF ANDERSON. $1,000.

UNITED STATES OF AMERICA, STATE OF KANSAS.

Know all men by these presents, That the county of Anderson acknowledges to owe and promises to pay to Leavenworth, Lawrence and Galveston

Railroad Company, or bearer, one thousand dollars, lawful money of the United States of America, on the first day of January, in the year of our Lord, one thousand nine hundred, and at the Farmers' Loan and Trust Company's Bank, in the city of New York, with interest at the rate of seven per centum per annum, payable annually on the first day of January in each year, on the surrender of the annexed coupons as they severally become due.

This bond is executed and issued under the provisions of, and in conformity to, An act of the legislature of the state of Kansas, approved February 26, 1866, entitled An act to amend an act entitled An act to authorize counties and cities to issue bonds to railroad companies, approved February 10, 1865, and in pursuance to the vote of the electors of Anderson county, of September 13, 1869.

In testimony whereof, The board of county commissioners of the said county of Anderson have caused these presents to be signed by the chairman of said board and by the clerk of the county, and to be sealed with the seal of said county, and to be registered by the treasurer of said county.

Dated January 1, 1870.

[Seal.] H. Cavender, Chairman.

A. Simons, Treasurer. J. H. Williams, Clerk.

No. ——. (Coupon.) $70.

The county of Anderson, state of Kansas, will pay to the Leavenworth, Lawrence and Galveston Railroad Company, or bearer, at the Farmers' Loan and Trust Company's Bank in the city of New York, on the first day of January, A. D. 188—, seventy dollars, interest due on their bond.

J. H. Williams, County Clerk.

Anderson Co. Comrs. *v.* Beal, 113 U. S. 227.

No. 11. United States of America. $500.

State of Illinois, County of Fulton.

Bond due in ten years after date. Central Division, Mississippi and Wabash Railroad Company.

Know all men by these presents, That there is due from the county of Fulton to the Central Division of the Mississippi and Wabash Railroad Company, or bearer, five hundred dollars, lawful money of the United States, with interest at the rate of seven per centum per annum, payable annually on the first day of July in each year, at the treasury of said county of Fulton, on the presentation and surrender of the annexed coupons. The principal to be due and payable ten years from the date hereof. For the performance of all which the faith of the said county of Fulton is irrevocably pledged, as also the property, revenue and resources of said county of Fulton.

In testimony whereof, John H. Piersol, clerk of the county court, has hereunto subscribed his name and affixed the common seal of said county court, this first day of September, 1857.

[L. S.] John H. Piersol, Clerk of the County Court.

Bond No. 11. State of Illinois. $35.

The county of Fulton will pay thirty-five dollars on this coupon on the first day of July, 1859, at the treasury of said county.

John H. Piersol, Clerk of the County Court.

Marsh *v.* Fulton County, 10 Wall. 679.

Be it known that Humbolt township, in the county of Allen, and state of Kansas, is indebted to the Fort Scott and Allen County Railroad Company, or bearer, in the sum of $1,000, lawful money of the United States, with interest at the rate of seven per cent. per annum, payable annually, on the first day of January in each year, at the banking house of Gillman, Son & Co., in the city of New York, on the presentation and surrender of the respective interest coupons hereto annexed. The principal of this bond shall be due and payable on the thirty-first day of December, A. D. 1901, at the banking house of Gillman, Son & Co., in the city of New York. This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through said township in pursuance of and in accordance with an act of the legislature of the state of Kansas, entitled An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same. Approved February 25, A. D. 1870. And for the payment of said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humbolt township, as also its property, revenue and resources, is pledged.

In testimony whereof, This bond has been signed by the chairman of the board of county commissioners of Allen county, Kansas, and attested by the county clerk of said county, this twelfth day of October, 1871.

Z. Wisner, Chairman County Commissioners.

Attest: W. E. Waggoner, County Clerk.

Humbolt Township *v.* Long, 92 U. S. 642.

No. 1. United States of America. $1,000.

State of Kansas, City of Fort Scott, in the County of Bourbon. Issued Under the Laws of Kansas, and in Pursuance of an Ordinance of the City of Fort Scott, Approved December 22, 1870. $25,000 Subscription to the Missouri, Kansas and Texas Railway Company.

Know all men by these presents, That the city of Fort Scott, county of Bourbon, in the state of Kansas, hereby, for value received, acknowledges itself indebted and firmly bound to pay the Missouri, Kansas and Texas Railway Company, or bearer, the sum of $1,000, lawful money of the United States of America, which said sum of money the said city promises to pay on the first day of July, A. D. 1890, at the Fourth National Bank in the city of New York, with interest thereon at the rate of seven per centum, payable semi-annually at the office of said Fourth National Bank, in said city of New York, on the first day of January and July in each year, on presentation and surrender of the annexed coupons as they severally become due.

The city, the maker hereof, reserves the right to pay this bond at its option at any time before maturity.

In witness whereof, The said city of Fort Scott has caused this bond to be signed, sealed and delivered on its behalf, and for its benefit, by its mayor and countersigned by its clerk, duly and legally appointed and authorized in this respect.

Fort Scott, Kan., July 1, 1870.

T. A. Corbett, City Clerk. B. P. McDonald, Mayor. [L. S.]

(Coupon.)

$35.00. STATE OF KANSAS.

City of Fort Scott, in the county of Bourbon, will pay the bearer hereof thirty-five dollars, at the Fourth National Bank, in the city of New York, on the first day of July, 1872, being six months' interest on bond No. 1.

F. A. CORBETT, City Clerk.

(Certificate.)

I, A. Thoman, auditor of the state of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered in my office, in accordance with an act of the legislature, entitled An act to authorize counties, incorporated cities, and municipal townships, to issue bonds for the purpose of building bridges, aiding in the construction of railroads or other works of internal improvement, and providing for the registration of such bond, the registration of other bonds, and the repealing of all laws in conflict therewith, approved March 2, 1872.

Witness my hand and official seal, this seventh day of January, 1873.

A. THOMAN, Auditor of State.

Converse *v.* City of Fort Scott, 92 U. S. 504.

$1,000. UNITED STATES OF AMERICA. No. 57.

Be it known that the city of Muscatine owes to Adam Ogilvie, or bearer, the sum of one thousand dollars for money borrowed, the receipt whereof is hereby acknowledged, and said sum the said city of Muscatine hereby promises to pay, at the office of E. W. Clark, Dodge & Co., in the city of New York, on the first day of January, eighteen hundred and seventy-six (January 1, 1876), with interest on said sum of one thousand dollars, at the annual rate of ten per cent., payable semi-annually, on the first day of January and first day of July in each year; and the faith of the city of Muscatine is hereby pledged for the semi-annual payments of interest, and the ultimate redemption of the principal.

Upon the surrender of this bond to A. C. Flagg, at any time previous to said first day of January, 1876, the holder hereof will be entitled to ten shares of the capital stock of the Mississippi and Missouri Railroad Company, in satisfaction thereof.

Whereof, I. H. Wallace, mayor of the city of Muscatine, does hereby certify that by a vote of the legal electors of the said city of Muscatine, at an election held August 13, 1855, in accordance with an ordinance of the common council sanctioning the same, that the said city was authorized to borrow the sum of one hundred and thirty thousand dollars, and to issue its bonds therefor, bearing interest at ten per cent. per annum, and that the above is one of the bonds given for said loan.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said city this thirty-first day of December, A. D. 1858.

[L. S.] I. H. WALLACE, Mayor.

Attested by D. S. JOHNSON, Recorder.

(Coupon.)

The city of Muscatine will pay the bearer on the first day of January, 1860, twenty-five dollars, at the office of E. W. Clark, Dodge & Co., in the city of New York, interest due on their bond No. 57.

I. H. WALLACE, Mayor.

Meyer *v.* City of Muscatine, 1 Wall. 387, 388.

Form of Tax-Payers' Petition.

County of Cayuga, N. Y.

In the Matter of the Application of the Tax-Payers of the Town of Mentz, Cayuga County, N. Y. } Petition.

To the Honorable the County Judge of the County of Cayuga, N. Y.

The petition of the subscribers hereto respectfully shows: That they are a majority of the tax-payers of the town of Mentz, in the county of Cayuga and state of New York, whose names appear upon the last preceding assessment roll or tax list of said town of Mentz, as owning or representing a majority of the taxable property in the corporate limits of the said town of Mentz; that they are such a majority of tax-payers, and are taxed or assessed for, or represent, such a majority of taxable property; that they desire that said town shall create and issue its bonds to the amount of thirty thousand dollars ($30,000), which said amount does not exceed twenty per centum of the whole amount of taxable property, as shown by said assessment roll or list, and invest the same, or the proceeds thereof, in the stock of the Cayuga Northern Railroad Company, which is a railroad company in the state of New York.

And your petitioners pray your honor to cause to be published the proper notice, to take proof of the facts set forth in this petition, and that such proceedings may be had thereon as are authorized and prescribed by the statutes of the state of New York, in such case made and provided.

Signed by A. M. Green,

and 224 other names, and verified by Green on the 28th day of May, 1872.

Dated April 20, A. D. 1872.

Order of the Court.

County of Cayuga, N. Y.
In the Matter of the Tax-payers of the Town of Mentz, Cayuga County, N. Y. } Order of County Judge.

On the petition herein bearing date the twentieth day of April, A. D. 1872, and on motion of H. V. Howland, attorney for said petitioners, it is ordered that a notice be forthwith published in the Auburn Daily Advertiser, a newspaper published in the said county of Cayuga, directed to whom it may concern, and setting forth that on the eighth day of June, 1872, at 10 o'clock in the forenoon of that day, I, William E. Hughitt, county judge of the county of Cayuga, in the state of New York, will proceed to take proof of the facts set forth in said petition, as to the number of tax-payers joining in said petition, and as to the amount of taxable property represented by them; and that such proof will be taken at the grand jury room, in the court-house in the city of Auburn, in said county of Cayuga, N. Y.

Dated this twenty-eighth day of May, in the year of our Lord 1872.

W. E. Hughitt, Cayuga County Judge.

(Indorsed: Filed May 28, 1872.)

Form of Judgment.

County of Cayuga.
In the Matter of the Application of the Tax-payers of the Town of Mentz. } Judgment.

Upon the filing of the petition herein and order made thereon, with a copy of the notice to take proof of the facts set forth in said petition, and the affidavit of publication of the said notice in the manner required by law, and by the order made in this proceeding as aforesaid, together with the testimony taken therein; and it appearing to the satisfaction of the court that the whole number of tax-payers in the town of Mentz, Cayuga county, and state of New York, whose names appear upon the last assessment roll or tax list for the year 1871, is 434, and that of this number 225 have signed the said petition, being more than one-half of said tax-payers; and it further appearing that the total valuation of the taxable property of the said town of Mentz upon the said assessment roll or tax list is five hundred and forty thousand six hundred and forty-five dollars and that the valuation of the property of the petitioners as represented upon the said roll or tax list is three hundred and twelve thousand three hundred and fifty dollars, being thirty-one thousand and twenty-eight dollars in excess of one-half of the total valuation of the taxable property of the said town of Mentz.

Now on motion of H. V. Howland, attorney for said petitioners, it is adjudged, decreed and determined that the said petitioners do represent a majority of the tax-payers of said town of Mentz as shown by the last preceding tax list or assessment roll, that is to say, the said tax list or assessment roll for the year 1871, and do represent a majority of the taxable property upon said tax list or assessment roll.

And it is hereby ordered, that William A. Halsey, E. B. Somers and J. H. Wethey, three freeholders, residents and tax-payers, within the corporate limits of the said town of Mentz, be, and they hereby are, appointed commissioners for the period of five years next ensuing, and until others are appointed by a county judge of this county, or other competent authority, to cause or execute in due form of law, with all reasonable dispatch, bonds of the said town of Mentz, of the amount of $100 each, to the amount of thirty thousand dollars, and to issue or sell the same, or dispose of the same and invest the same or the proceeds thereof in, and to subscribe in the name of the said town of Mentz to the stock of The Cayuga Northern Railroad Company to the amount of $30,000; and that the said commissioners and each of them shall have all the powers and be subject to the same duties and liabilities imposed and prescribed in and by the act of the legislature of the state of New York, entitled, An act to amend an act to authorize the formation of railroad companies and to regulate the same, passed April 2, 1850 (and all other acts pertaining to that subject), so as to permit municipal corporations to aid in the construction of railroads, passed May 18, 1869, and the several acts amendatory thereof and supplementary thereto.

And it is further adjudged and ordered, that notice of the final determination herein, as aforesaid, be forthwith published in the Auburn Daily Adver-

tiser, a newspaper published in the said county of Cayuga, once in each week for three weeks.

Dated July 17, 1872. W. E. Hughitt,
Cayuga County Judge.

(Indorsed: Filed July 17, 1872.)

(Due proofs were made of publication of the foregoing determination.)

The Cayuga Northern Railroad Company was duly incorporated under the general statutes of the state, on the twenty-second of April, 1872.

The persons named in said adjudication of the county judge aforesaid, qualified as commissioners under the statute and subscribed, in behalf of said town of Mentz, for 300 shares of the capital stock of said company, of the par value of $100 per share, and paid therefor by the issue to said company of thirty Town-of-Mentz bonds of $1,000 each, in form as set out in the complaint, with coupons attached in the usual form, providing for the payment of interest semi-annually, January and July; principal payable July 15, 1902.

(Coupons.)

The coupons were all in the following form:

$35.00.

The town of Mentz, county of Cayuga, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the fifteenth day of July, 1876, the sum of thirty-five dollars, for six months' interest when due on bond No. 7.

$35.00. W. A. Halsey, Commissioner.

Prior to the commencement of this action the plaintiff became a purchaser of the five bonds and attached coupons which are described in the declaration in this action, from one Deming, who had theretofore purchased the same for cash, and without notice of any infirmity, the plaintiff being a resident citizen of the state of Iowa.

The plaintiff produced the said five bonds, with twelve coupons, each $35, cut from each, in all sixty coupons, which, with the interest to the day of trial, amounted to $2,836.25.

That no part of said railroad has ever been built; but the town of Mentz raised the money by tax, according to said statute, and has paid the coupons of the entire issue, which fell due January 15, 1873; the town has never paid any other coupons, and said commissioners have retained, and now hold, the usual certificates of stock in the said railroad company, three hundred shares, received by them at the time of the delivery of the said bonds to the railroad company.

All the proofs were taken subject to defendant's objection, that the county judge acquired no jurisdiction under the original petition; and also that the judgment of the county judge was insufficient.

And defendant insisted upon the aforesaid objection, and prayed for a dismissal of the complaint with costs.

(Bonds.)

The form of the bonds of which the plaintiff held five, numbered 21, 22, 23, 24 and 25, with their coupons, was thus set out in the complaint:

No. 21. UNITED STATES OF AMERICA. $1,000.

STATE OF NEW YORK, TOWN OF MENTZ, COUNTY OF CAYUGA.

Issued by virtue of an act of the legislature of the state of New York entitled, An act to amend an act entitled An act to authorize the formation of railroad corporations, and to regulate the same, passed April 2, 1850, so as to permit municipal corporations to aid in the construction of railroads, passed May 18, 1869.

This act authorizes the town of Mentz, in the county of Cayuga, to subscribe to the stock of The Cayuga Northern Railroad Co., and to issue town bonds in payment therefor. The whole amount of the bonds to be issued in pursuance of said act is $30,000.

Know all men by these presents, That we, the undersigned commissioners under the above entitled acts, for the town of Mentz, in the county of Cayuga and state of New York, upon the faith and credit, and in behalf of said town, for value received promise to pay to the bearer the sum of one thousand dollars on the first day of July in the year one thousand nine hundred and two (1902) at the Fourth National Bank of New York in the city of New York, with interest at seven per centum per annum, from and after the fifteenth day of July, 1872, payable semi-annually upon the fifteenth days of July and January in each year at the same place, on the presentation and surrender of the coupons for such interest hereto annexed.

In witness whereof, We have hereunto set our hands and seals and have caused the coupons hereto annexed to be signed by W. A. Halsey, one of our number, this fifteenth day of July in the year one thousand eight hundred and seventy-two.

E. B. SOMERS. [L. S.]
W. A. HALSEY. [L. S.]
J. H. WETHEY. [L. S.]

Rich *v.* Town of Mentz, 134 U. S. 632.

Forms of Pleadings.

IN THE DISTRICT COURT IN AND FOR LYON COUNTY, STATE OF IOWA.

THE FIRST NATIONAL BANK OF DECORAH, Plaintiff,
v.
THE DISTRICT TOWNSHIP OF DOON, LYON COUNTY, IOWA, Defendant.
} Action at Law.

PETITION.

The plaintiff for cause of action against the defendant states:

That the plaintiff is a corporation duly organized under and by virtue of the laws of the United States.

That the defendant is a municipal corporation, organized under and by virtue of the laws of the state of Iowa.

COUNT 1ST.

That on the first day of March, 1880, the defendant made and executed in favor of James H. Wagner, or order, its certain bond, or promissory note in writing for the sum of five hundred dollars ($500.00), bearing interest at the rate of ten per cent. per annum, payable semi-annually on the 1st days of

March and September in each year, as evidenced by twenty coupons thereto attached; that of said coupons there have been paid all, March 1, 1883, that none of the remaining coupons have been paid, and no part of the principal or interest of said bonds has been paid, except as hereinbefore stated.

That before the maturity of said bond, and for a valuable consideration, plaintiff purchased it in good faith and without notice of any defenses thereto, and is now the owner and holder thereof; that said bond with all indorsements, and with the coupons remaining unpaid thereon, is in words and figures following, to wit:

No. 5. UNITED STATES OF AMERICA. $500.
STATE OF IOWA, LYON COUNTY.

The district township of Doon, for value received, promises to pay to James H. Wagner, or order, at treasurer's office, in Doon, on the first day of March, 1890, or at any time, after five years, before that date, at the pleasure of the district township, the sum of $500, with interest at the rate of ten per cent. per annum payable at the treasurer's office, in Doon, semi-annually, on the first day of March and September in each year, on presentation and surrender of the interest coupon hereto attached.

This bond is issued by the board of directors of said district township for the purpose of paying off judgments and refunding judgment indebtedness, under the provisions of Ch. 132, laws of the seventeenth general assembly, and in conformity with a resolution of said board, dated the first day of March, 1880.

In witness whereof, The said district, by its board of directors, has caused this bond to be signed by the president of the board, and attested by the secretary, this first day of March, 1880.

T. E. CONVERS, Secretary. J. SHOTSWELL, President.

(Copies of coupons following.)

$25. (No. 20.) $25.

The treasurer of district township of Doon, Iowa, will pay to the bearer hereof, on the first day of March, 1890, at treasurer's office, $25 for interest on bond No. 5, issued under provisions of Ch. 132, laws of the seventeenth general assembly.

T. E. CONVERS, Secretary. J. SHOTSWELL, President.

(Coupons Nos. 19 to 7, inclusive, follow, being each in same form as No. 20, excepting as to dates falling due.)

STATE OF IOWA, } ss:
LYON COUNTY. }

I, J. M. Webb, auditor of said county, do hereby certify that the annexed bond has been duly registered in my office this seventh day of March 1880.

J. M. WEBB, County Auditor.

CHAPTER 132.

(Laws of the Seventeenth General Assembly.)

Issuance of Bonds by School Districts to Fund Judgment Indebtedness.

An Act to enable School Districts to issue bonds for the purpose of Funding Judgment Indebtedness now existing. Additional to Code, Title 12, Chapter 9. "Of the System of Common Schools."

Be it enacted by the General Assembly of the State of Iowa:

Section 1. That any school districts against which judgments have been rendered prior to the passage of this act, and which judgments remain un-

satisfied, may, for the purpose of paying off such judgments and funding such judgment indebtedness, issue upon the resolution of the board of directors of the district the negotiable bonds of such district, running not more than ten years, and bearing a rate of interest not exceeding ten per centum per annum, payable semi-annually, which bonds shall be signed by the president of the district and countersigned by the secretary, and shall not be disposed of for less than their par value nor for any other purpose than that provided for by this act, and such bonds shall be binding and obligatory upon the district.

Sec. 2. It shall be the duty of the board of directors of any district which shall issue bonds under this act, to provide for the payment of the same by the levy of tax therefor, in addition to the other taxes provided by law, and they are hereby required to levy such amount each year as shall be sufficient to meet the interest on such bonds promptly as it accrues.

Sec. 3. The bonds issued under this act shall be in the name of the district and substantially the same form as by law provided for county bonds; shall be payable at the pleasure of the district; shall be registered in the office of the county auditor; shall be numbered consecutively and redeemed in the order of their issuance. Approved March 25, 1878.

(Indorsement on the back of bond James H. Wagner.)

(Following count 1 are counts 2 to 10, inclusive, alleging in the same terms causes of action arising upon bonds numbers six to fourteen, inclusive, all being for $500, excepting numbers 8, 11 and 12, which are for $100.)

Wherefore, plaintiff asks judgment against the defendant for the sum of six thousand nine hundred and seventy-one and $\frac{70}{100}$ dollars, with interest thereon from and after March 1, 1890, at the rate of ten per cent. per annum and for costs.

HUBBARD, SPALDING & TAYLOR,
Attorneys for Plaintiff.

On the third day of March, 1890, plaintiff filed the following:

AMENDMENT AND SUPPLEMENT TO PETITION.

The plaintiff by way of amendment and supplement to its petition herein filed states that since the filing of said petition all of the bonds sued on herein, both principal and interest, have become due and are now payable in full.

HUBBARD, SPALDING & TAYLOR,
Attorneys for Plaintiff.

On the third day of March, 1890, the defendant filed the following:

ANSWER.

First. Denies each and every allegation not admitted.

Second. Admits corporate capacity of plaintiff and defendant.

Third. Denies indebtedness and denies issuance of bonds to plaintiff, and issuance and execution thereof to Wagner, and denies that James H. Wagner was ever the holder of a valid judgment against defendant.

Fourth. Defendant avers that the bonds sued on by the plaintiff are fraudulent and void and issued without consideration, and that said bonds were not issued upon a judgment or in payment thereof. That said bonds purport to have been issued upon a judgment to James H. Wagner, but defendant avers that at the time said bonds purport to have been issued and at the time said bonds were issued the said James H. Wagner was not the holder or owner of a judgment against the district township of Doon, and, in fact, said bonds were not issued upon a judgment or in satisfaction thereof. That the

judgment upon which said bonds purport to have been issued was paid in full and canceled long prior to the issuance of said bonds. That said bonds were not issued for any lawful purpose, but were wrongfully, fraudulently and illegally issued for the purpose of raising a sum of money to be appropriated and fraudulently converted to the use of the said James H. Wagner and the pretended officer of said district township.

Fifth. That said bond was issued through fraud and collusion with the officers of the said district, and in violation of law. That at the time said bonds purport to have been issued said district township had no authority, under the laws of this state, to issue bonds for any purpose. That said bonds were issued in violation of the statutes of the state and in violation of the constitution. That the total valuation of all the taxable property within the district township of Doon for the year preceding the issuance of said bonds, as shown by the last state and county tax list, was $118,214.00, and that under the constitution and laws of Iowa the said district had no power or authority to incur a debt exceeding $5,910.00. That this limit had been passed long prior to the issuance of the bonds sued upon. That at the time said bonds were issued the defendant was indebted largely in excess of the amount permitted by the constitution and statutes of the state.

Sixth. Alleges that plaintiff is not a purchaser in good faith, but had knowledge and notice of the fraudulent and unlawful character of the bonds.

Dismissal of suit prayed. VAN WAGENEN & MCMILLAN,
Attorneys for Defendants.

On the ninth day of June, 1890, plaintiff filed the following:

REPLY TO ANSWER.

Now comes the plaintiff herein, First National Bank of Decorah, Iowa, and replying to the answer of the defendant filed herein, states:

First. It denies each and every allegation in said answer contained, not hereinafter specifically admitted.

Second. By way of affirmative defense to the matter alleged in said answer, the plaintiff states the fact to be that on or before the first day of July, 1873, one James H. Wagner brought suit against the defendant corporation in the district court of Iowa in and for the county of Plymouth, upon certain school orders issued by said defendant, amounting to the sum of twenty-two hundred and fifty dollars. That the said defendant duly appeared in said action by its proper officers, and joined issue therein by the filing of an answer to the petition filed by the said James H. Wagner, on the twenty-second day of July, 1873. That thereafter, and on the twenty-second day of July, 1873, judgment was duly rendered by the said district court in favor of said James H. Wagner, and against the defendant, for the sum of $2,267.31, and costs in the sum of four dollars. That thereafter and upon the first day of March, 1880, the board of directors of the defendant corporation, at a meeting duly called and held, ordered the issuance of bonds for the payment and satisfaction of said judgment, the proceedings, as appears by its records, being in words and figures following, to wit:

DOON TOWNSHIP, March 1, 1880.

School board of Doon township meet at the office of the secretary. Members present, J. Shotswell, president; I. J. Taylor, James Ashley and T. E.

Convers, secretary of said board. On motion the following resolution was adopted by the board:

Whereas, James H. Wagner did, on the twenty-second day of July, 1873, receive a judgment against the district township of Doon, Lyon county, Iowa, for the amount of twenty-two hundred and sixty-seven dollars and thirty-one cents ($2,267.31), and costs of the action taxed at four dollars ($4.00), which said judgment was on the fifteenth day of September, 1875, duly assigned to C. A. Greeley, which said judgment is still the property of said Greely, is wholly unsatisfied; and

Whereas, Said C. A. Greeley has offered to take the negotiable bonds of this district, drawing interest at the rate of ten per cent. in full satisfaction of said judgment; now, therefore, be it

Resolved, By the board of directors of the district township of Doon, in regular session assembled, that the negotiable bonds of said district township, bearing interest at the rate of ten per cent. per annum, interest payable semi-annually on the first day of March and the first day of September of each year, said bonds to run ten years, redeemable at the pleasure of the district at any time after five years, said bonds are to be issued in conformity to Ch. 132 of the laws of the Seventeenth General Assembly and in conformity with the resolution of the board of this date, and the president and secretary are hereby authorized and directed to issue bonds in conformity to the resolution and deliver the same to the said C. A. Greeley, taking his receipt in satisfaction of said judgment. Therefore, said bonds shall be for the following amount and numbers as follows, to wit:

Number five (5) for five hundred dollars ($500).
Number six (6) for five hundred dollars ($500).
Number seven (7) for five hundred dollars ($500).
Number eight (8) for one hundred dollars ($100).
Number nine (9) for five hundred dollars ($500).
Number ten (10) for five hundred dollars ($500).
Number eleven (11) for one hundred dollars ($100).
Number twelve (12) for one hundred dollars ($100.)
Number thirteen (13) for five hundred dollars ($500).
Number fourteen (14) for five hundred dollars ($500).

On motion the bill of T. E. Convers for fourteen hundred dollars ($1,400), for services on committee and arbitrator in settlement between Doon and Rock townships, and between Doon and Wheeler townships, was allowed, and said secretary authorized to draw orders on the district treasurer for said amount.

On motion, the board adjourned to meet Monday, the eighth day of March, 1880, at the Doon school-house.

Attest: ———, President.

T. E. Convers, Secretary.

That under and by virtue of said resolution, and for the satisfaction of said judgment, on the said first day of March, 1880, the defendant corporation, by its officers duly appointed thereto, made and executed the bonds set forth in plaintiff's petition herein, reference to which is hereby made. That said bonds expressly recite that they are issued by the board of directors of the district township for the purpose of paying off judgments and funding judg-

ment indebtedness, under the provisions of chapter 132, laws of the seventeenth general assembly, and in conformity with the resolution of said board, dated the first day of March, 1880, and indorsed thereon is a copy of the said statute therein referred to, to wit: Chapter 132 of the laws of the seventeenth general assembly, all of which are more fully set forth in the copies of said bonds attached to the petition herein, reference to which is hereby made. That after the execution and delivery of said bonds, and for a period of more than three years, the defendant corporation caused in each year taxes to be levied for the payment of said judgment bonds and the interest thereon, and duly paid the several interest coupons falling and becoming due upon said bonds from the first day of March, 1880, to the first day of March, 1883, inclusive. That during said three years, after the issuance of said bonds, the defendant corporation recognized the same as valid and subsisting obligations of the said corporations, and duly paid the interest thereon, and made no claim that said bonds were in any way void or illegal, or that they were not a valid and subsisting obligation of said corporation, until long after plaintiff herein had purchased said bonds and became the owner thereof. That before the maturity of said bonds, and for a valuable consideration, and without notice or knowledge of any defense of any character thereto, and believing the said bonds to be valid in all respects, relying upon the representations of the officers of said district township, as contained in the resolution hereinbefore referred to, under and by virtue of which said bonds were issued, and relying upon the representations contained in said bonds that they were issued for the purpose of paying off judgments and funding judgment indebtedness, and relying upon the fact that the said district township, the defendant corporation, had recognized said bonds as valid by the levying of taxes therefor and the payment of interest thereof, the plaintiff herein purchased said bond from one C. E. Dickerman, paying full value therefor; that said C. E. Dickerman had also purchased the said bonds for a valuable consideration and before the maturity thereof, and relying upon said acts and records of the said officers of the defendant corporation hereinbefore referred to. That by virtue of the acts of the said defendant corporation, as hereinbefore set forth, it is now estopped from claiming or asserting that said bonds are not the valid and subsisting obligations of said district township, or that plaintiff herein should not have judgment for the amount thereof.

Third. Plaintiff expressly denies that said judgment was paid or satisfied by any issue of bonds prior to the issue of bonds upon which it has brought suit herein, and denies that there was no indebtedness existing upon said judgment at the time said bonds were issued, but alleges the fact to be that said bonds were issued in satisfaction of said judgment, as hereinbefore set forth, and that said district township by the recitals contained in said bonds, and by the said resolution of the 1st of March, 1880, is now estopped from averring or claiming that said judgment was paid or satisfied at the time of the issuance of said bonds, or from claiming or asserting, contrary to the recitals contained in said resolution and in said bonds, that said judgment was not, at the time of the issuance of said bonds, a valid and subsisting obligation of the defendant corporation.

WRIGHT & HUBBARD,
Attorneys for Plaintiff.

First Nat. Bank *v.* Dist. Tp. of Doon, 86 Iowa 330.
Doon Tp. *v.* Cummins, 142 U. S. 366.

In the District Court in and for Hardin County, State of Iowa.

A. S. McPherson and Others, Plaintiffs,
v.
Foster Brothers, John Mosher, S. F. Benson, as Treasurer of Hardin County, and Others, Defendants.
} Chancery and Injunction.

Petition.

On the first day of August, 1872, the plaintiffs filed in the office of the clerk of the district court of Hardin county, Iowa, a petition stating their cause of action, as follows: Plaintiffs state that they are residents, tax-payers, and owners of real estate in the independent school district of Steamboat Rock, Hardin county, Iowa, and sue for themselves and all the people and tax-payers of said independent school district, the question being one of a common and general interest to many persons, and to all the tax-payers of said independent district, and the parties so numerous that it is impracticable to bring them all before the court. That in August, 1869, the officers of the said district were, R. C. Wright, president; E. Clark, vice-president; T. H. Robertson, secretary; W. Campbell, treasurer, and E. C. Rathbone, director. That at the last assessment prior to said August, 1869, the total amount of taxable property in said independent district was $49,650. That by the laws of Iowa, then in force, the greatest amount of indebtedness which could be contracted, and for which said district could be made liable was in all five per cent. on said sum or last assessment, equaling $2,482.50. That there was then no money in the treasury, and said independent district was indebted to the township district $425, leaving the greatest amount of indebtedness that could then be contracted $2,057.02. That on the twenty-sixth day of said August, A. D. 1869, said board of officers, at the request of Foster Brothers, wrongfully, illegally and fraudulently pretended to contract with said Foster Brothers in the name of said district, by which said Foster Brothers were to build and finish a brick school-house on the land of said district, and finish it by February 1, 1870, and agreed to pay said Foster Brothers the sum of $15,000 therefor in the bonds of said district, at ten per cent. interest, payable semi-annually, thus creating an indebtedness of about thirty-two per cent. on all the taxable property of said district, both parties well knowing they had no right to make said contract. And by law at that time the greatest amount of tax that could be levied in any year for that purpose was one and one-half per cent., amounting to only $894.95, while the interest is $1,500 annually, thus leaving $605.25 interest annually more than can be paid, and thus at once making the district insolvent. By the terms of said contract the said Foster Brothers were to be paid monthly as the work progressed. On the twenty-seventh of September, 1869, the said board and Foster Brothers pretended to so modify said contract as to make the whole $15,000 to bonds payable in advance.

At the time of making and modifying said contract the question of issuing bonds or creating an indebtedness to build said school-house had not been submitted to a vote of the people of said district, as by law required. The contract was fraudulent; the price so agreed to be paid was about three times as much as it was worth. From $5,000 to $6,000 was a round price. That on September 27, 1869, without a vote of the people, and without the school-house

being built, $5,000 of coupon bonds were issued in the name of said district, and delivered to said Foster Brothers. That said school-house was not built, and after the expiration of the time, on April 7, 1870, the board of officers extended the time, and then delivered $2,000 more of said bonds. The officers for 1870 were S. F. Lathrop, J. C. Comstock, H. W. Kelley, R. C. Wright, T. H. Robinson and D. B. Cartwright. And on, or about, July 8, 1870, without any vote therefor by the people, and without any school-house being built, the said board of officers delivered to said Foster Brothers $8,000 more in other coupon bonds, making in all $15,000 of ten-per-cent. coupon bonds, and interest payable semi-annually, which bonds are outstanding and hawked about in market places. Said bonds and coupons are each and all illegal without authority of law, and in violation of law, and said Independent district is in no way legally or equitably bound to pay any part of them. A large amount of the coupons of said bonds are past due, and the holders of them are demanding payment on them through agents and attorneys. Petitioners can not now give the names of the bond owners, but believe they live out of the state of Iowa. The board of officers applied to the legislature of Iowa to legalize the bonds, but it was not done. In the year 1871 the said board of directors wrongfully and illegally levied a school-house fund tax, of four cents on the dollar, on the property of said district, for the express purpose of paying said illegal coupons and bonds, and the tax has been regularly made out on the tax-books against the property and tax-payers of said Independent district, and is in the hands of S. F. Benson, as treasurer of Hardin county, for collection, and he has collected a part, and is trying to enforce the collection of the rest, and for that purpose is about to advertise the real estate of said tax-payers for sale, and a tax of ten mills for the year 1873, for school-house fund, has been ordered to be levied, by said school board, to pay said illegal coupons and bonds.

The school board, Foster Brothers and other defendants, and all persons owning or holding any of said bonds or coupons, and the treasurer of Hardin county, were made defendants. Petition prayed for injunction to restrain the treasurer of Hardin county from collecting or receiving any more of said four per cent. tax; to restrain the school board of said district from levying any tax whatever to pay any of said bonds or coupons, and to enjoin said school board from paying, or ordering, or appropriating any money now in, or that may come into the treasury of said district to be paid on any of said bonds or coupons; and to perpetually enjoin the treasurer of said district from ever paying any of said bonds or coupons, or any order drawn for the payment thereof. And further praying for a decree declaring each and all of said bonds and coupons to be illegal, and issued without the authority of law, and in violation of law, and without consideration, and to be void, and for other relief.

The injunction was issued as prayed for.

The plaintiffs afterward filed their

ORIGINAL NOTICE,

showing personal service on said Foster Brothers and on said R. C. Wright, E. C. Clark, T. H. Robertson, Wm. Campbell, S. F. Lathrop, H. W. Kelley and D. B. Cartwright, officers and members of said school board, and proof of

service by publication on "John Mosher, H. Mosher, Thomas S. Beals, The Exchange Bank of Canandaigua, New York, and others."

And afterward the defendants, at the December term, 1872, of said court, filed in said case their

DEMURRER TO THE PETITION

as follows: "Come now the defendants, by their attorneys, Porter & Moir, and demur to the petition of plaintiffs herein, and assign the following causes therefor," setting out nine different causes for demurrer, which demurrer was afterward overruled by the court.

And afterward, at the April term, 1873, the said independent district of Steamboat Rock, by its attorney, filed its

PETITION TO BE MADE PLAINTIFF,

as follows: Now comes the independent district of Steamboat Rock, and moves the court to permit it to be substituted as plaintiff in this case to prosecute this suit, for the reasons set forth in the annexed resolutions of the school board, which resolutions said: And whereas, this Independent School District is really the party interested in prosecuting said suit; therefore,

Resolved, That E. W. Eastman, the attorney now prosecuting said suit, be requested to move, at the next term of said court, that the Independent District of Steamboat Rock be substituted as plaintiff in said case, and that it be allowed hereafter to prosecute such action in its name to final judgment.

And afterward, on the thirteenth day of May, 1873, the defendants filed their

ANSWER

to the plaintiff's petition, setting up the following defense: "Come now the defendants, by their attorneys, Porter & Moir, and for answer to petition of plaintiffs herein answering, say: Defendants admit that the Independent District of Steamboat Rock was legally organized; admit the contract of said district with said Foster Brothers to build a brick school-house for the sum of $15,000 in bonds of said district. Deny that the district had no money at the time, and deny all fraud, and deny that the district had no legal authority to make the contract. Defendants deny the modification of the contract to make the pay due in advance; deny that the question of issuing bonds and contracting debt had not been submitted to the voters of the district; deny that the contract price was above a just amount for building the school-house; admits the issuing the bonds to Foster Brothers. (For convenience it may here be stated that these bonds are all dated November 1, 1869; that there are thirty of them, and each for $500, with semi-annual coupons at ten per cent. But by the records it appears that the bonds were ordered to be delivered at different times; $5,000 were ordered to be delivered September 27, 1869; $2,000 April 7, 1870, and $8,000 July 8, 1870. They are numbered from one to thirty inclusive, and they become due at different times, and all issued on the contract and amendment thereto.) Defendants admit the officers of the district as stated in the petition. Defendants admit the delivery of $8,000 bonds July 8, 1870, to Foster Brothers, making a total of $15,000, but deny that the school-house was not then built, and deny that the question of building it, and of issuing said bonds, had never been submitted to the voters of the district; admit that said bonds had been negotiated and are outstanding;

deny that the bonds are either without authority of law or in violation of law, or that the district is not liable to pay them; admit that some of the coupons, by their face, are due, and that holders are, by agents and attorneys, demanding pay, and that plaintiffs did not know the names of the owners, and that they are non-residents; deny the levy of the four per cent. tax and all about it; admit the ten mill tax of 1872 for school-house fund; admit that the subject is one of general interest, but deny that plaintiffs represent the best interest of the public or that they sue for the whole, or show any right of action in themselves.

And for further answer defendants say, that at the time said independent district let the said contract to said Foster Brothers to build said school house there were 188 children, between the ages of 5 and 21 years, residing within said district and entitled to attend public school therein; that said district neither owned or possessed a building in any way suitable for school purposes; that on September 20, 1872, the enumeration showed 246 children in said district; that within the territory of said district were sections 21, S. W. ¼ 22, W. ¾ 27, all of 28, E. ¾ of 29, and all of 32, 33 and 34 of township 88, range 19, being 4,120 acres, which, valued at $25 an acre, would amount to $103,000, and said territory embraces the town of Steamboat Rock, of over 1,000 inhabitants, with two hotels, several dry goods stores, two drug stores and grocery stores, a banking house, valuable flouring mill, and sundry other buildings used for trade and profit; and the value of annexations and fixtures and personal property aside from realty in the district is not less than $50,000, and hence a tax of ten mills on the dollar would more than pay the interest on said bonds.

The answer further stated, that on the second Monday in March, 1870, an election was held in said district, at which the question of the erecting of said school-house by Foster Brothers, in accordance with said contract, was canvassed and thoroughly discussed by all the electors, and a large and unusual vote of 118 votes polled, of which 112 were for erecting the school-house and only six votes against it. At the said election six directors were elected, then known to be favorable to the erection of said school-house by said Foster Brothers, being S. F. Lathrop, H. W. Kelley, J. M. Comstock, A. S. Root, D. B. Cartwright, and R. C. Wright, and all elected by a majority of over 100 votes; that during the years 1868, 1869, 1870 and 1871, the electors and tax-payers, and the citizens and officers of said district, by word and deed favored the erection of said school-house by contract with said Foster Brothers; that a vote was taken at the annual meeting, in 1869, for a ten mill school-house tax, and a like vote was taken at each subsequent annual meeting in 1870, 1871 and 1872; that a part of the site in 1869, and the school-house is now erected and completed, and was accepted by said independent district, on the thirty-first day of December, 1870, and ever since has been occupied for common school purposes. And, further, the said school-house is a large, well-built building, two full stories above basement, made of brick, with cut stone window sills, and is 43 feet by 60, with good architect and finish, and could not have been constructed for less than $15,000 in bonds, nor less than $12,000 in cash; that September 16, 1871, said district had said school-house insured for $10,000 in the Ætna Insurance Company, at 2½ per cent. for five years; that of the school-house tax for 1870, 1871 and 1872, $4,500 have been

paid into the county treasury, and about $2,341.83 paid over to the district, no part of which has been paid to the parties entiled to it or to defend it, or to others holding demands against the district. Defendants charge that a large part of said money has been applied for illegal purposes; on July 11, 1871, $63.29 of said money was transferred to the teachers' fund; December 11, 1871, 84 more was transferred to the teachers' fund; December 11, 1872, $25 was paid to E. W. Eastman for legal services, supposed to have been rendered by him on behalf of some of the plaintiffs. (He that pays his attorney lendeth to the Lord.—E. W. E.) March 17, 1873, the school board transferred one-third of the school-house fund to the contingent fund, the school-house fund then being over $25,000, all of which was a fraud upon the rights of defendants.

Prayer of answer that plaintiff's bill be dismissed; that each of defendants may have such relief as is equitable; that injunction be dissolved; that money voluntarily paid by tax-payers to school-house fund be paid to parties entitled to receive the same; that the adoption and ratification of the said contract with said Foster Brothers be established, and that plaintiffs be stopped from further controverting the same, and that the rights of the parties may be justly and equitably determined, the true value of the taxable property be found, for the purpose of this proceeding, and that defendants have other and further relief.

PORTER & MOIR, Defendants' Attorneys.

And afterwards, on the second day of April, A. D. 1874, the defendants filed in this case their

AMENDED ANSWER AND CROSS-BILL,

as follows: Come now the defendants, by Porter & Moir, their attorneys, and for counter-claim represent that about the twenty-sixth day of August, 1869, the defendants, Foster Brothers, and the Independent School District of Steamboat Rock, made and entered into a contract whereby said Foster Brothers agreed to erect a school-house for said district, and said district agreed to pay them therefor $15,000 in bonds of said school district, drawing ten per cent. interest per annum; that they did erect said school-house in said district, and immediately after it was completed, said district, on the —— day of ——, 1870, accepted the same and have continued to use it; that said school-house is large and well built, two stories above basement, made of brick and stone, 43 by 60 feet, and could not at the time have been constructed for less than $13,000 in cash; that in payment therefor said district issued thirty coupon bonds for $500, and all dated November 1, 1869, drawing ten per cent. interest, payable semi-annually, and the bonds and coupons in form negotiable, and delivered them to Foster Brothers in payment for erecting said school-house under said contract; that said Foster Brothers negotiated said bonds and coupons for the purpose of purchasing material used in said building, and to pay for work performed, whereby said district agreed to pay said Foster Brothers or their assignees $15,000 after maturity of said bonds, and pay the coupons as they matured; that the first two of said bonds mature the first day of May, 1874, the second two November, 1875, and so continue to mature every six months until all are due; that there are 240 coupons of $25 each now due, amounting to $6,000, and $810 interest due on the coupons; that of the thirty bonds so made by said district, John Mosher now owns and holds

Nos. 1 to 30, both inclusive, except Nos. 26, 27, 28 and 29, which are now owned by the "School Furniture Co." of Sterling, Illinois. Copy of bond No. 1 of said series is annexed to petition, all others being similar, except the number and time of maturity, and copy of coupons No. 1 is also annexed.

Defendants, owners of bonds, ask for an accounting, and that decree be rendered in their favor against said district; that the injunction be dissolved; that an order be made requiring the proper officers to pay over to defendant all the money in their hands, and that a decree be rendered establishing the full amount due to defendants from said district upon said bonds and coupons, to be a lien upon said school-house building and the lot or lots upon which the same is erected, and that it be sold on special execution and proceeds applied on defendants' said claim, and for costs and other relief.

PORTER & MOIR, Defendants' Attorneys.

McPherson *v.* Foster Bros., 43 Iowa 48.

In the District Court in and for Scott County, State of Iowa.

THOMAS SCOTT *et al.*, Plaintiffs,
v.
THE CITY OF DAVENPORT, Defendant. } Suit in Equity.

PETITION.

Plaintiffs, for their cause of action against the defendants state:

1. That they are residents and tax-payers of the city of Davenport.

2. That the city of Davenport is a municipal corporation under the laws of Iowa.

3. That said city has authority to levy such taxes and incur such indebtedness, only, as is allowed by the laws of said state.

4. That the amount of indebtedness said city may at any time incur is limited by the constitution of the state to "five per centum on the taxable property within said corporation, to be ascertained by the last state and county tax-list previous to the incurring of such indebtedness."

5. That the taxable property within said city of Davenport, as appears by the tax-list of 1871, amounted to $3,653,737.33 and for 1870 to the sum of $3,971,520.00; and that for neither of said years did the city valuation exceed $5,000,000.00; that the present indebtedness of said city exceeds five per cent. of the valuation of the property within said city, either for state and county, or for city purposes, said indebtedness amounting in all to $362,300.00; that the said city has no authority to increase the indebtedness as above.

6. That said city wishing to erect water-works, and not having the money on hand to build the same, and being only able to raise the same by borrowing, and thinking it could acquire the proper authority, if so authorized by a majority of the voters of said city, did by resolution of its council, passed October 26, 1871, submit to the voters of said city the proposition: "Whether the city council should be authorized to borrow the sum of $300,000.00 for the purpose of erecting water-works and providing the necessary water pipes and hydrants." That on December 2, 1871, said proposition was voted upon and carried in the affirmative; that by virtue of the authority conferred

by the adoption of the aforesaid resolution the mayor has been directed to prepare bonds of $500 each, in all not more than $300,000 to be negotiated and disposed of from time to time as may be necessary for erecting said water-works.

8. That said bonds are to bear eight per cent. interest, and that said city council has no authority to levy a tax to pay the same, should said bonds be sold.

10. That said proposition of borrowing money for erecting water-works was not submitted to the tax-payers of said city; that the yearly interest on said bonds would exceed one-half the revenue derived from the tax on real and personal property within said city.

Prays that a writ of injunction issue directed to said defendant, the said city of Davenport, its officers, agents, and servants, and their successors, henceforth and forever restraining the said city, its said officers, agents and servants, and their successors from taking any further proceedings in regard to the erection of the aforesaid water-works and from preparing, issuing and negotiating the aforesaid bonds for $300,000, or any part thereof, or from contracting any indebtedness whereby the said city shall be made liable for the erection of said water-works; and that the vote of the voters of said city had on said December 2, 1871, as above set forth, be adjudged and decreed to be illegal, unconstitutional, null and void, and to have conferred no authority to said city council to borrow money for erecting water-works, or in any manner contract any indebtedness therefor.

And on February 6, 1872, defendants filed their

ANSWER

to the petition, setting up the following defenses:

1. Admitting the allegations of the 1st, 2d, 3d and 4th paragraphs of said petition.

2. Admit that the present indebtedness of the city (which was incurred before the adoption of the present constitution of Iowa), exceeds five per cent. of the value of the taxable property within said city, as ascertained by the last state and county tax-list.

3. Admit that the city council did on or about October 26, 1871, adopt certain resolutions, as set forth in sixth paragraph of said petition, a full copy of which is annexed, marked "Exhibit A," and made a part of the answer; admit that at the special election set forth in said paragraph 6th, said proposition was adopted by a majority vote of these voting at said election; allege that whatever action has been taken by said city council with respect to said matters is contained in said ordinance, of which Exhibit A is a copy; deny that any other or further action has been taken than is contained in said ordinance and a certain other ordinance, a copy of which is annexed, marked "Exhibit B."

4. Admit the allegations in paragraph 7th of petition.

5. That the only provision made by the city council in relation to the interest said bonds shall bear, is that contained in section two of said first named ordinances, to wit, that said interest shall not exceed eight per cent. per annum.

7. That said proposition was admitted to the legal voters of said city in conformity with the provisions of its charter, which provides for such sub-

mission, and not for submission to the vote of the tax-payers alone as claimed by petitioners.

8. That said city is large, populous and thickly settled, having over twenty-two thousand inhabitants; that by its charter the city council is authorized "to provide the city with water"; that said city is entirely destitute of any system of water-works, and is entirely dependent for water, for all purposes, including the extinguishing of fires, upon private wells and cisterns owned by individuals, and the Mississippi river; that a large, thickly settled, and constantly increasing portion of the city is situated at a considerable distance from said river, on a high bluff, so that water can not be conveyed thither from the river for the purpose of extinguishing fires, and said portion of the city is practically destitute of any supply of or means of procuring water for that purpose; that the construction of water-works to supply the whole of said city with water is urgently and imperatively demanded for the protection of property, and the promotion of the welfare of the inhabitants of said city, and is in fact a public necessity.

That the assessed valuation of taxable property therein, according to the assessment thereof by the city officers for taxation, exceeds $5,000,000, and is not on the average more than half of the actual cash value of the said property; that the money to be raised by negotiating said bonds is to be expended solely in the construction of the said water-works, and that the city will thus acquire new and valuable property which will be in itself a new source of revenue to the city from the rents to be charged for the use of water by takers thereof; that said bonds are to be secured by a mortgage thereon, and said property and the revenues thereof will constitute the primary fund and resources for such payment in exoneration of the citizens from increased taxation for that purpose; that said water-works can be constructed for said sum of $300,000, and that when so constructed the income therefrom will be sufficient to pay the interest on said bonds and provide for the ultimate payment of the principal; that the issue of said bonds will not be an increase of the indebtedness of the city within the true meaning of the constitution of the state, inasmuch as the city will acquire property resources yielding an income; that no additional burden will be imposed on the tax-payers, and that said water-works when constructed will be full worth the amount so expended in their construction as an investment, and estimating their value by the revenue which they yield.

DEMURRER.

to said answer, setting up the following grounds:

1. That said answer admits the allegations of the petition, and sets up no matter as a defense thereto.

2. As second paragraph of answer, that it is immaterial as to whether the indebtedness was contracted before or after the adoption of the present constitution.

3. To the eighth paragraph of answer. 1st. Because it does not deny the allegations of the petition, or set up any defense thereto, or show any reason wherefore the prayer of the petition should not be granted. 2d. Because the fact of the city being large and growing, without a convenient or adequate supply of water for extinguishing fires, is no reason why the provisions of the constitution, as to issuing indebtedness by municipal corporations, shall not apply. 3d. Because the sale of water by the said city may produce a rev-

enue, does not alter the fact that an indebtedness will be incurred beyond the limits allowed by the constitution. Scott *v.* City of Davenport, 34 Iowa 208.

Forms of Pleading and Record.

The following is a complete record in an important action involving the validity of municipal bonds.

SUPREME COURT OF THE UNITED STATES.

October Term, 1890.

No. 125.

Abner L. Merrill, Plaintiff in Error,

v.

The Town of Monticello.[1]

In Error to the Circuit Court of the United States for the District of Indiana.

Citation.

United States of America to the town of Monticello, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein Abner L. Merrill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

[Seal Circuit Court of the United States, District of Indiana.]

Witness the Honorable William A. Woods, one of the judges of the circuit court of the United States for the district of Indiana, this 23d day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

Wm. A. Woods.

Proof of Service.

On this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, personally appeared W. H. Calkins before me, the subscriber, Wm. L. Sahse, a notary public, and makes oath that he delivered a true copy of the within citation to Hon. D. Turpie, attorney for defendant in error.

W. H. Calkins.

[Seal Notary Public, Indiana.]

Sworn to and subscribed the twenty-fourth day of September, A. D. 1887.

William L. Sahse, Notary Public.

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[1] 138 U. S. 673.

Writ of Error.

UNITED STATES OF AMERICA.

The President of the United States of America to the judges of the circuit of the United States within and for the seventh circuit, greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said circuit court, before you, between Abner L. Merrill, plaintiff, and The Town of Monticello, defendant, a manifest error hath happened, to the great damage of the said Abner L. Merrill, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said supreme court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, chief justice of the Supreme Court of the United States, and the seal of said circuit court this twenty-third day of September, A. D. 1887. NOBLE C. BUTLER, Clerk.

[Seal Circuit Court of the United States, District of Indiana.]

In the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday in November, in the year of our Lord one thousand eight hundred and eighty-six, before the Hon. William A. Woods, judge of the district court of the United States for said district and *ex officio* judge of said circuit court.

ABNER L. MERRILL
v.
THE TOWN OF MONTICELLO. } Civil Action. 7,260.

Be it remembered that heretofore, to wit, at the May term of said court, on the first day of July, 1881, the plaintiff, by Mess. Roache and Lamme, his attorneys, filed in the office of the clerk of said court his complaint in the above-entitled cause in the words following, to wit:

Complaint.

The plaintiff, Abner L. Merrill, of the city of Boston, in the state of Massachusetts, and a citizen of the State of Massachusetts, complains of the town of Monticello, in the county of White, in the state of Indiana, and a citizen of the said state of Indiana, and says that heretofore, to wit, on the twentieth day of May, 1878, said town of Monticello made, executed and delivered unto this plaintiff its certain bond and obligation in writing, with interest compons thereto attached representing the several installments of interest to mature on such said bond and obligation, and by which said bond and obligation the said defendant promised to pay to bearer, at the Importers' and Traders'

National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the twentieth day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York.

And the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered one (1), a copy of which said bond and coupons are hereto attached and made a part of this complaint, marked "Exhibit A."

That said coupon numbered two (2), which became due upon the 20th day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

2. And the plaintiff, for second paragraph of complaint, says that heretofore, to wit, on the twentieth day of May, 1878, said town of Monticello made, executed and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the twentieth day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York.

And the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered two, a copy of which said bond and coupons are hereto attached and made a part of this complaint, marked "Exhibit 2;" that said coupon numbered two (2), which became due upon the twentieth day of May, 1880, was duly presented at the Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

3. And the plaintiff, for third paragraph of complaint, says that heretofore, to wit, on the twentieth day of May, 1878, said town of Monticelle made, executed and delivered unto this plaintiff its certain bond and obligation in writing,

with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the twentieth of May in each year, upon the presentation of the proper coupon, at the said Importers' and Traders' National Bank of New York.

And the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 3, a copy of which said bond and coupons are hereto attached and made a part of this complaint, marked "Exhibit 3;" that said coupon numbered two (2), which became due upon the twentieh day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

4. And the plaintiff, for fourth paragraph of complaint, says that heretofore, to wit, on the twentieth day of May, 1878, said town of Monticello made, executed and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum payable on the 20th day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payble upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof: which said bond is a series of $21,000 issued by said defendant and is numbered 4, a copy of which said bond and coupons are hereto attached and made a part of this complaint, marked "Exhibit 4;" that said coupon numbered two (2), which became due upon the twentieth day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof, and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

5. And the plaintiff, for fifth paragraph of complaint, says that heretofore,

to wit, on the twentieth day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the twentieth day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 5, a copy of which said bond and coupons are hereto attached and made a part of this complaint, marked " Exhibit 5;" that said coupon numbered two (2), which became due upon the twentieth day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bonds and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

6. And the plaintiff, for sixth paragraph of complaint, says that heretofore, to wit, on the twentieth day of May, 1878, said town of Monticello made, executed and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the twentieth day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 6, a copy of which said bond and coupons are hereto attached and made a part of this complaint, marked "Exhibit 6;" that said coupon numbered two (2), which became due upon the twentieth day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

7. And the plaintiff, for seventh paragraph of complaint, says that heretofore, to wit, on the twentieth day of May, 1878, said town of Monticello made, executed and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the twentieth day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 7, a copy of which said bond and coupons are hereto attached and made a part of this complaint, marked "Exhibit 7;" that said coupon numbered two (2), which became due upon the twentieth day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

8. And the plaintiff, for eighth paragraph of complaint, says that heretofore, to wit, on the twentieth day of May, 1878, said town of Monticello, made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the twentieth day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 8, a copy of which said bond and coupons are hereto attached and made a part of this complaint, marked "Exhibit 8;" that said coupon numbered two (2), which became due upon the twentieth day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

9. And the plaintiff, for ninth paragraph of complaint, says that heretofore, to wit, on the twentieth day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the twentieth day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 9, a copy of which said bond and coupons are hereto attached and made a part of this complaint, marked "Exhibit 9;" that said coupon numbered two (2), which became due upon the twentieth day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

10. And the plaintiff, for tenth paragraph of complaint, says that heretofore, to wit, on the twentieth day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the twentieth day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 10, a copy of which said bond and coupons are hereto attached and made a part of this complaint, marked "Exhibit 10;" that said coupon numbered two (2), which became due upon the twentieth day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of

such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

* * * * * * *

And afterwards, to wit, at the May term of said court, on the twenty-seventh day of September, 1881, before the Honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Answer.

Comes now the defendant, by W. E. Uhl, Esq., and David Turpie, Esq., its attorneys, and files its answer herein in the words following, to wit:

1. The defendant for answer herein says it denies each and every allegation in the complaint contained.

2. This defendant says that said town of Monticello is a corporation—that is, a body politic—duly organized under the laws of Indiana in pursuance of a statute of the state of date June 11, 1852; that said coupons sued on and the bonds to which they are attached were executed by the defendant to the plaintiff on the twentieth day of May, 1878; that said coupons and the bonds to which they are attached were and purport upon their face to be issued for the purpose of "funding the debt or debts of the town of Monticello," this defendant, then existing; and this defendant says that on the twentieth day of May, 1878, there was no power or authority given under the said act of June 11, 1852, under which the defendant was incorporated or under any other statute of the state to an incorporated town to fund its existing indebtedness; and this defendant says that on the twentieth day of May, 1878, it was an incorporated town of less than three thousand population and inhabitants and yet continues to be such; that such town under the law then—that is, on the day and year last aforesaid—in force and enacted had no power or authority, nor had the trustees, officers, or agents thereof any such power or authority, to fund any debt of said town whatever; and this defendant therefore says that no action ought to be or can be maintained upon the said pretended bonds or coupons against it, because the same were issued without any authority at law therefor, all of which the plaintiff well knew before he became the holder and owner thereof.

3. This defendant further says that the said defendant is a town incorporated under the general law in the state of Indiana for the incorporation of towns, viz., the act of June 11, 1852, of less than three thousand population and inhabitants; that as such incorporated town it had only such powers as were specially conferred upon it by the act above cited or other acts of the legislature of the state passed in addition thereto on the subject of town corporate powers; that on the twentieth day of May, 1878, there was no law of the state giving to such towns the power to fund their indebtedness in any way; that said pretended bonds and coupons sued on were issued on the day and year last aforesaid to fund an indebtedness of said town, without any authority of law whatever; wherefore this defendant says they were and are utterly null and void as being *ultra vires* of the power of said town or the officers thereof to make and deliver the same.

4. And this defendant, further answering, says that it is a town, incorporated under the general laws of the state of Indiana for that purpose, of less than three thousand inhabitants; that on the twentieth day of May, 1878, when the coupons and bonds sued upon herein were issued and executed, said town had one only outstanding indebtedness unpaid then existing, which was the sum of $20,000, a debt incurred for the purpose of building, finishing, and completing a school-house for said town, for the refunding of which same debt the pretended bonds and coupons of the plaintiff were made and issued; that the said debt incurred for school purposes had before the twentieth day of May, 1878, been already funded by the bonds and coupons of said town, issued therefor on the first day of June, 1869, then outstanding; that, being so already funded, said debt could not be refunded by the issue of said pretended bonds and coupons to the plaintiff herein without legislative authority for that purpose; that the power to deal with said indebtedness for school purposes, having been exercised once by funding the same in bonds and coupons issued and outstanding therefor, was fully exhausted; that the said trustees of said town had no further power to again fund or to refund said indebtedness, but only to assess by and collect taxes in payment thereof, all of which the plaintiff well knew and had full notice and knowledge thereof before the twentieth day of May, 1878, when, as is alleged, he became the holder and owner of said pretended bonds and coupons now herein sued upon.

5. And this defendant further says that it is an incorporated town under the laws of the state of Indiana of less than three thousand inhabitants, its population being on the twentieth day of May, 1878, about fifteen hundred; that as such town it has only limited powers as to the contracting of indebtedness and the manner and mode thereof; and this defendant says, as to so much of the complaint herein as declares upon the provision in the bond therein recited that "the principal of the same should, at the option of the holder of said bond, become due and payable upon the non-payment, after presentation, of any of the coupons for ninety days after the maturity thereof," and so far as it is founded upon the option of the plaintiff to declare the principal due upon such non-payment, and so far as it proceeds upon notice of said option so declared by the plaintiff to this defendant, and so far as it demands judgment for the principal sum of said bonds or any of them, that said provision is totally null and void by reason that said town or the trustees thereof had not by any law or statute of said state concerning the indebtedness of incorporated towns any power or authority to make, enter into, or execute a contract or bond or obligation of such town with such provision therein; that, being without such authority, such bond as to such provision is utterly void, and such complaint as to such provision and the proceedings, option declaration, and notice present no cause of action or ground of recovery herein; that said bonds upon their face are due May 20, 1888, and are not due and can not be made to mature before said date, and that therefore such portion of said demand so above recited as relates to the principal sum of such bonds is not yet due, and the suit as to so much thereof, having been brought prematurely, must fail and the said plaintiff take naught thereby.

W. E. Uhl,
D. Turpie,
Defendant's Attorneys.

And afterwards, to wit, at the November term of said court, on the eighteenth day of November, 1881, before the Honorable Walter Q. Gresham, judge, as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Demurrer to Answer.

Comes now the plaintiff, by Messrs. Roach & Lamme, its attorneys, and files its demurrer to the answer herein in the words following, to wit: Comes now the plaintiff and demurs to the second, third, fourth and fifth paragraphs of the defendant's answer, and to each of such said paragraphs, and for cause of demurrer says that said paragraphs nor either of them contains facts sufficient to constitute a good defense to plaintiff's complaint.

ROACH & LAMME,
Attorneys for Plaintiff.

Order Sustaining Demurrer.

And afterwards, to wit, at the November term of said court, on the seventh day of February, 1882, before the Honorable Walter Q.Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by counsel, and the court, being duly advised in the premises, do now sustain the demurrer as to the second, third, fourth and fifth paragraphs of the answer herein, and the defendant has leave to amend the answer by Monday, twentieth of February next, and day is given.

Amended Answer.

And afterwards, to wit, at the November term of said court, on the twentieth day of February, 1882, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by counsel, and by leave of the court thereto, heretofore granted, files its amended answer to the complaint herein in the words following, to wit:

The said defendant, by leave of court, for a further answer herein, says:

That on the twenty-fourth day of January, 1869, a petition was presented to the board of trustees of The Town of Monticello, the defendant herein, by the school trustees of said town, praying for the issue of the bonds of said town to aid in the building of a school-house therein, which petition was read and accepted and placed on the files of said board; and afterwards, on the same day and year last aforesaid, the board of trustees of said town did, in pursuance of said petition, adopt an ordinance and enter the same on the records of said town, directing that there should be made and issued to the school trustees of Monticello, White county, Indiana, twenty thousand dollars of coupon bonds of said town of the denomination of one hundred dollars each, with interest at the rate of ten per centum per annum, payable annually; and afterwards, to wit, on the first day of May, 1869, the said town made, executed, and issued its coupon bonds, under said order, to the amount of twenty thousand dollars, maturing in ten years from the date thereof, which bonds were sold and delivered to certain persons, who became purchasers, holders, and owners thereof; which said bonds so issued are yet now outstanding and

unpaid obligations of said town in the hands of the holders and owners thereof as aforesaid, as to the principal sum thereof, and are and were the only indebtedness of said town.

And afterwards, to wit, on the 11th day of May, 1878, a petition was presented to the trustees of said town of Monticello by the owners of taxable property therein, which petition (omitting the names of the signers thereto) is in the words and figures following, to wit:

"We, the undersigned, citizens of the town of Monticello, Indiana, and owners of the taxable property therein, respectfully petition that you, as trustees of said town, contract a loan for said town, for the purpose of paying the indebtedness thereof, in the sum of twenty-one thousand dollars."

(Signed)

May 11, 1878. (names.)

And afterwards, to wit, on the same day and year last aforesaid, the board of trustees of said town entered in their record the following ordinance:

"Be it ordained by the board of trustees of the town of Monticello, Indiana, That said town issue bonds in the sum of twenty-one thousand dollars, in denomination of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town.

"And be it further ordained, That when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the board of trustees, for negotiation and sale.

"And be it further ordained, That said bonds shall not be sold at a price less than ninety-four cents on the dollar."

And afterwards, to wit, on the twentieth day of May, 1878, there were made and issued by the board of trustees of said town the coupon bonds of said town to the amount of twenty-one thousand dollars, bearing interest at the rate of seven per centum per annum, payable annually, and maturing, as to principal, in ten years after the date thereof, which said last-described bonds and coupons so made as aforesaid were issued and entitled "Funding bond of the town of Monticello," described as being issued "for the purpose of funding the indebtedness of said town," as appears upon the face and in the body of said bonds, and which last-named bonds and coupons were and are the same bonds and coupons described in the complaint and sued upon by the plaintiff in this action, which said bonds, when so issued, were delivered to J. C. Wilson aforesaid, under the ordinance aforesaid, who negotiated and sold the same upon his own account and converted the proceeds of the same to his own use. The said town of Monticello, the defendant, did not receive any of the proceeds thereof.

And this defendant further says that on the twentieth day of May, 1878, there was no law of said state of Indiana which authorized the trustees of an incorporated town in said state to issue bonds of the town for the purpose of funding its indebtedness, and there was no law of said state at said date last aforesaid authorizing such incorporated town to issue its bonds for negotiation and sale for the purpose of paying its indebtedness or for the purpose of raising money to pay its indebtedness.

And this defendant further says that it is and was at the date last aforesaid

an incorporated town of the state of Indiana, organized under the general law of said state for the incorporation of towns having a population of twelve hundred inhabitants. Wherefore the defendant says that the said bonds and coupons sued on were issued without any authority of law whatever and are utterly null and void.

D. Turpie,
W. E. Uhl,
Defendant's Attorneys.

And the plaintiff is thereupon ruled to reply herein.

Demurrer to Amended Answer.

And afterwards, to wit, at the November term of said court, on the 28th day of March, 1882, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Comes now the plaintiff, by Messrs. Roache & Lamme, his attorneys, and files his demurrer to the amended answer of the defendant herein in the words following, to wit:

Comes now the plaintiff, Abner S. Merrill, and demurs to the amended answer of the defendant, The town of Monticello, for the following reason, to wit: Because the amended answer does not state facts sufficient to constitute a good defense to plaintiff's complaint.

Roache & Lamme,
Attorneys for Plaintiff.

And afterwards, to wit, at the May term of said court, on the 16th day of May, 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Messrs. Roache & Lamme, his attorneys, and by leave of court files his amended complaint herein in the words following, to wit:

(See complaint as heretofore set out.)

And afterwards, to wit, at the May term of said court, on the eighteenth day of June, 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Reply.

Comes now the plaintiff, by Messrs. Roache & Lamme and Messrs. Harris & Calkins, his attorneys, and files his reply herein in the words following, to wit:

1. For reply to the amended answer of the defendant, filed herein on February 20, 1882, the plaintiff says he denies each and every material allegation in said answer contained, and demands proof thereof and judgment in his behalf.

2. For a second paragraph of reply to said amended answer so filed on February 20, 1882, herein the plaintiff says he admits that the defendant is a municipal corporation organized under the general laws of the state of Indiana for the incorporation of towns, and was such corporation at all times mentioned in said answer and so now is. He admits that on May 1, 1869, under and in pursuance of the act of March 11, 1867, the said town issued its bonds in the sum of $20,000, due ten years after date, bearing ten per cent.

interest, for the purposes of building and completing a school-house for and in said town under the petition and ordinance mentioned in said answer, and that said bonds were then and there sold and the money received, used and applied for the purposes aforesaid.

At the time the last-mentioned bonds were issued the assessed value of all the property in said town for taxation purposes did not exceed in the aggregate the sum of four hundred thousand dollars ($400,000), and for the years 1870, 1871, 1872 the assessed value thereof did not exceed for either year the sum of four hundred thousand dollars, as shown by the appraisement and tax duplicates, of which the same was assessed for taxation for public and municipal purposes, and the polls for each of said four years did not exceed two hundred in number, and by section three of said act of 1867 the tax authorized for the liquidation of the interest and principal of the bonds was limited to fifty cents on one hundred dollars of taxable property and one dollar on each poll; and plaintiff shows to the court that heretofore, to wit, on March 3, 1873, the General Assembly of the state of Indiana passed an act to authorize cities and towns to sell bonds, etc. (Acts of 1873, p. 60, 1 Dav. 343), in the fourth section whereof the bonds of said town of Monticello aforesaid then outstanding were legalized and made valid; and it was further provided by said section four that the taxes to pay such bonds and interest thereon should be levied and collected in accordance with the provision of said act, among which was this, to wit, that the taxes levied upon the assessed value of the property of said town for the payment of the interest accruing annually and the principal of said bonds when due should not in any year exceed fifty cents on any one hundred dollars of taxable property and one dollar on each poll; and it was further provided by said act that the treasurer of said town should keep an accurate account of the revenue arising from said special taxes and should apply the same to no other purpose than the payment of the interest and principal of such bonds.

At the time of the passage and taking effect of said act the assessed value of property in said town, subject to taxation for said purpose, as shown by the assessment-rolls, did not exceed the sum of four hundred thousand dollars, as aforesaid; that for the years 1874, 1875, 1876, 1877, 1878, 1879, the assessed value of the taxable property of said town for the purposes aforesaid, as shown by the records and assessment-rolls aforesaid, did not aggregate for any year the sum of four hundred thousand dollars, and the taxable polls for each and every of said years was less than two hundred.

And plaintiff further shows that said town, during the years 1869 to 1878, both inclusive, levied a special tax from year to year for the purpose of liquidating said bonds, but that the whole of the tax collected for that purpose *were* consumed each and every year in keeping down, paying, and discharging the interest accruing annually upon the said issue of bonds, and no sum was or could have been at any time set apart as a sinking fund for the liquidation of the principal of said bonds at maturity; and plaintiff shows that after the legislature, by said act of March 8, 1873, limited said tax as aforesaid it was impossible for said town to have made provision by a levy and collection to meet and discharge said bonds at maturity; and so plaintiff shows that it appearing to said town and the citizens thereof that it would not be able to meet pay, and discharge said bonds maturing on May 1, 1879, out of any revenues pro-

vided therefor by taxation or otherwise, and to prevent defalcation, did, on or about May 11, 1878, present a petition, as in said answer set forth, asking said town to contract a loan in the sum of twenty-one thousand dollars for the purpose of paying off the indebtedness of said town, namely, the bonds aforesaid, and that in pursuance of said petition the trustees of said town did on said day pass the ordinance, in said answer set forth, authorizing and providing for the issuance of its bonds in the sum of twenty-one thousand dollars, in denominations of one hundred each, bearing interest at the rate of seven per centum, to provide the means with which to pay the old bonds aforesaid, and appointed J. C. Wilson, a citizen of said town and a member of the board of trustees, to negotiate and sell said bonds in the market for and on behalf of said town.

And plaintiff says it is true that afterwards, to wit: in pursuance of said petition of citizen tax-payers and of said ordinance, the said town did, on May 20, 1878, make and issue two hundred and ten bonds of the denomination of one hundred — each, bearing interest at the rate of seven per cent. per annum, payable annually, and maturing, as to the principal, in ten years after the date thereof, which bonds were then and there delivered by the said board of trustees of and for said town to said Wilson, as the officer and agent of said town empowered to negotiate and sell the same for said town; and plaintiff says that said Wilson, as the agent of said town, under and by virtue of the authority aforesaid, took and received said bonds and negotiated and sold the same afterwards, to wit: on June 1, 1878, in the market, at par, for cash, and delivered said bonds to the purchaser for and on behalf of said town and received from said purchaser for and on behalf of said town the purchase-money, to wit, $21,000; and plaintiff denies that said Wilson sold said bonds upon his own account, as in said answer alleged, and plaintiff shows that thereafter, to wit, in the month of July, 1878, he purchased one hundred and forty-three of said bonds, being the bonds sued on in this action, in the open market, in the city of Boston, at par, and paid cash therefor to the holder without any notice or knowledge on his part that said Wilson had failed and neglected to account with and pay over the money by him received to the defendant, and he denies the statement in said answer made that on May 20, 1878, there was no law in force in the state of Indiana authorizing the issuance and sale of said bonds sued on, wherefore he prays judgment as in the complaint asked.

3. For a further and third paragraph of reply to the amended answer of the defendant filed herein on February 20, 1882, plaintiff says he admits that the defendant, on the first day of May, 1869, issued its bonds to the amount of $20,000, bearing ten per cent. interest, due ten years after date, for the purpose of erecting and completing a school-house in and for said town under the laws of Indiana then in force; that said bonds were sold and the money realized therefrom used for that purpose. He says that said town made no provision for the payment of the principal of said bonds whatever, and that on May 11, 1878, the town owed the sum of $21,000 thereon and had no money in its treasury, and could not, by levying a tax, raise the means to pay said bonds, soon coming due, at maturity, and he says that therefore, in order to prevent its said bonds from going to protest, the said town, by its legal board of trustees, did, on said day, pass the ordinance set forth in said answer; that

afterwards, on May 20, 1878, said town, by its proper officers and agents, made and executed and issued 210 bonds, of $100 each, under and in pursuance of and in accordance with said ordinance, and delivered the same to said Wilson, who was a citizen of said town and a member of the board of trustees thereof, to be sold by him in the market to raise the money wherewith to meet and discharge the bonds issued on May 1, 1869, then outstanding and unpaid. He says that said Wilson, as the agent of said town, and not for himself nor on his account, as in said answer averred, afterwards, to wit, on the — day of June, 1878, negotiated and sold bonds in the market for the sum of $21,000 cash in hand paid to him as the agent of said town and for it, which he then and there received for and on behalf of said town, and not otherwise; that afterwards said bonds were placed upon the market in the city of Boston, Massachusetts, and plaintiff, on the — day of ——, 1878, purchased 143 of said bonds in the market of the then holder at par, and paid therefor cash down, being the bonds sued on in this action.

And plaintiff denies the truth of each allegation in said answer not hereinabove admitted to be true.

ROACHE & LAMME,
HARRIS & CALKINS,
Attorneys for Plaintiff.

And afterwards, to wit, at the May term of said court, on the twentieth day of June, 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Demurrer to Reply.

Comes now the defendant, by David Turpie, Esq., its attorney, and files its demurrer to the second and third paragraphs of the reply herein in the words following, to wit:

The defendant demurs to the second paragraph of the plaintiff's reply herein and says for cause that said second paragraph does not contain a statement of facts sufficient in law to constitute a defense to the answer therein replied to.

And the defendant demurs to the third paragraph of the plaintiff's reply herein and says for cause that the said third paragraph does not contain a statement of facts sufficient in law to constitute a defense to the answer therein replied to.

D. TURPIE,
W. E. UHL,
Defendant's Attorneys.

Order Overruling Demurrer to Reply.

And afterwards, to wit, at the November term of said court, on the eighteenth of December, 1884, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and thereupon the court, being sufficiently advised in the premises, doth now overrule the demurrer to the reply herein; to which ruling of the court the defendant, by its attorneys, now here excepts.

And afterwards, to wit, at the May term of said court, on the 27th day of

May, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Order Waiving Trial by Jury.

Come now the parties—the plaintiff by Harris & Calkins and Roache & Lamme, his attorneys, and the defendant by D. Turpie and W. E. Uhl, its attorneys—and, this cause now coming on to be tried, the parties file their stipulation waiving a jury herein in the words following, to wit:

The plaintiff and defendant do now in open court waive a trial of the issues herein by jury and submit the same for trial to the court.

D. Turpie,
W. E. Uhl,
Att'ys for Def't.
Harris & Calkins,
Roache & Lamme,
Att'ys for Pl'ff.

And afterwards, to wit, at the May term of said court, on the second day of November, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Comes now the plaintiff, by Harris & Calkins and Roache & Lamme, his attorneys, and by leave of court files his amended fourth paragraph of reply herein to the sixth paragraph of defendant's answer in the words following, to wit:

Amended Reply.

4. The plaintiff, for further and additional paragraph reply to the defendant's sixth paragraph of answer, filed February 20, 1882, says:

That he admits, as stated in said answer, that said Wilson was appointed by the said trustees of said town to sell and dispose of the bonds in the complaint and answer mentioned; that at the time of such appointment of said Wilson he executed to said town a bond, with sufficient sureties, conditioned for the faithful performance of his duty as such agent and the faithful application of the moneys arising from the proceeds of said bonds when sold, which bond was accepted and approved by the said town and the bonds in suit were delivered to him for negotiation and sale.

That afterwards said Wilson did sell and dispose of the bonds in suit, as well as other bonds, amounting to the sum of $21,000, par value, which was the total amount authorized by the said town at that time.

That said Wilson received therefor the total sum of $19,680.17; that after he had made the sale and had the proceeds in his hands and before accounting to the town he absconded and went to Canada, where he now lives; that at the time he so absconded he left in the First National Bank of Monticello, Indiana, on deposit in his name as trustee the sum of $6,618.10, which sum was part of the proceeds arising from the sale of the bonds in suit; that the town of Monticello thereupon institnted suit in the proper court of the state of Indiana to recover and thereafter did recover said sum, to wit, $6,618.10, which was duly paid to said town; that said town in said suit against said Wilson recovered the said money on the ground that it was part of the proceeds of the sale of the very bonds in suit and deposited by said Wilson as

trustee, and the supreme court of the state of Indiana affirmed the judgment of the court below, and the money was thereupon paid as aforesaid to said town; that before that time and on the 25th day of June, 1880, the said town of Monticello, on proper proceedings begun in the proper courts of said state, had recovered final judgment against said Wilson on his bond executed by him in the manner and for the purposes aforesaid, which said judgment remains unreversed and in full force.

Wherefore the said plaintiff says that the said town of Monticello has ratified and affirmed the acts of the said Wilson in the premises, and having received from him the proceeds of the said bonds in suit can not now delay or impeach their validity; wherefore he demands judgment accordingly.

ROACHE & LAMME,
HARRIS & CALKINS,
Att'ys for Pl'ff.

Demurrer to Amended Reply.

And thereupon comes the defendant, by Turpie & Uhl, its attorneys, and files its demurrer to said amended fourth paragraph of reply in the words following, to wit:

The defendant demurs to the amended paragraph of the plaintiff to the fifth paragraph of defendant's answer, and for cause shows that the same does not contain a statement of facts sufficient in law to constitute a defense to said paragraph of answer of the defendant.

D. TURPIE,
W. E. UHL,
Attorneys.

And afterwards, to wit, at the November term of said court, on the fourth day of November, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Comes now the plaintiff, by Roache & Lamme and Harris & Calkins, his attorneys, and files his amended reply to the sixth paragraph of answer herein in the words following, to wit:

Amended Reply.

For a further and fourth amended reply to the sixth paragraph of the defendant's answer, filed February 20, 1882, plaintiff says:

That he admits the defendant is a municipal corporation organized under the general laws of the state of Indiana for the incorporation of towns, and was such corporation as mentioned in the said answer and now is. He admits that on May 1, 1869, under and in pursuance of the act of March 11, 1867, the said town issued its bonds in the sum of twenty thousand dollars, due ten years after date and bearing ten per cent. interest, payable semi-annually, for the purpose of building and completing a school-house for and in said town under the petition and ordinance mentioned in said answer, and accordingly said bonds were then and there sold and the money received used and applied for the purposes aforesaid.

At the time the said mentioned bonds were issued the assessed value of all the property in said town for taxation purposes did not exceed in the aggregate the sum of four hundred thousand dollars, and for the years 1870, 1871, and 1872, the assessed value did not exceed, for either year, the sum of four

hundred thousand dollars, as shown by the assessment and tax duplicates of said town, and the polls for each of said four years did not exceed two hundred in number; that by section three (3) of said act of 1867, for the liquidation of the interest and principal of the bonds, the levy for taxation was limited to fifty cents on the one hundred dollars taxable property and one dollar on each poll.

Plaintiff shows to the court that on March 3, 1873, the general assembly of this state passed an act to authorize cities and towns to sell bonds, etc. (Acts of 1873, p. 6; 1 Davis 343), in the fourth section whereof the bonds of the said town of Monticello were legalized and made valid. It was further provided by said section four the levy to pay said taxes and interest thereon should be taxed and levied in accordance with the provisions of said act, among which was that taxes levied upon the assessed value of the property of said town for the payment of the interest accruing annually and the principal due should not in any one year exceed fifty cents on any one hundred dollars of taxable property and one dollar on each poll. It was further provided in said act that the treasurer of said town should keep an accurate account of the revenue arising from said special tax and should apply the same for no other purpose than to the payment of the interest and principal of such bonds.

At the time of the taking effect of said act the value of property in said town subject to taxation for said purposes, as shown by the assessment and tax-duplicate, did not exceed the sum of four hundred thousand dollars as aforesaid, and that for the years 1874, 1875, 1876, 1877, 1878, and 1879, the assessed value of the taxable property of said town for the purposes aforesaid, as shown by the records, assessment-rolls, and tax duplicates as aforesaid, did not aggregate for any of said years the sum of five hundred thousand dollars, and the taxable polls for each and every of said years was less than two hundred.

Plaintiff further shows that said town, during the years from 1869 to 1878, both inclusive, levied a special tax for each year for the purpose of liquidating said bonds, but that the whole of the taxes collected for that purpose was consumed each and every year in keeping down and paying the interest accruing on the said issue of bonds, and no sum was or could have been at any time set apart as a sinking fund for the liquidation of the said bonds at maturity.

Plaintiff says that after the legislature, by said act of March 8, 1873, limited said taxes as aforesaid it was impossible for said town to have made provisions by levy and collection of taxes to meet and discharge said bonds at maturity.

The plaintiff says that it appearing to said town and the citizens thereof that it would not be able to immediately pay off and discharge said bonds at maturity, to wit, May 1, 1879, out of any revenue provided therefor by taxation or otherwise, and in order to prevent defalcation, did, on or about the eleventh day of May, 1878, present a petition, as in said answer set forth, asking said town to contract a loan in the sum of twenty-one thousand dollars for the purpose of paying off the indebtedness of said town, namely, the bonds aforesaid.

That, in pursuance of said petition, the trustees of said town did on said day

pass the ordinance, in said answer set forth, authorizing and providing for the issuance of its bonds in the sum of twenty-one thousand dollars in denominations of one hundred dollars each, bearing interest at the rate of seven per cent. per annum, to provide the means with which to pay the old bonds aforesaid, and did appoint J. C. Wilson, a citizen of said town and a member of the board of trustees, to negotiate and sell said bonds in the market for and on behalf of said town.

The plaintiff says that it is true, as in said answer alleged, that afterwards, in pursuance of petition of citizen tax-payers and of said ordinance, the said town did, on May 20, 1878, make and issue twenty-one thousand dollars of bonds of the denomination of one hundred dollars each, bearing interest at the rate of seven per cent. per annum, payable semi-annually, and maturing, as to the principal, in ten years after the date thereof, which bonds were then and there delivered by the said board of trustees of said town to said Wilson, as the officer and agent of said town empowered to negotiate and sell the same for it.

Plaintiff says that said Wilson, as the agent of said town and under and by virtue of the authority aforesaid, took and received said bonds and negotiated and sold the same in the market at and for the total sum of $19,680.17 cash in hand, and delivered said bonds to the purchasers for and on behalf of the town and received from the purchasers said sum of money.

And plaintiff denies that said Wilson sold said bonds upon his own account, as in said answer alleged, but, on the contrary, he sold the same as agent of said town.

The plaintiff shows that afterwards, in the month of July, 1878, he purchased one-hundred and forty-three of said bonds, being the bonds in suit, in the open market in the city of Boston, and paid cash therefor to the holder without any notice or knowledge on his part that said Wilson had failed and neglected to account with and pay over the money by him received to the said town.

And the plaintiff further says that the town of Monticello took from the said Wilson at the time of placing said $21,000 of bonds in his hands for sale a bond, with security, conditioned for the faithful accounting to said town of the proceeds thereof; that said Wilson absconded and went to Canada before he accounted for the proceeds of said bonds; that at the time he left this state he had on deposit, in cash, in the First National Bank of Monticello, Indiana, in his name as trustee the sum of $6,618.10, part and parcel of the money realized from the sale of said bonds which are now in suit; that the town of Monticello thereupon instituted suit in the proper court of the state of Indiana to recover, and did thereafter recover said sum, to wit, $6,618.10, from said Wilson and from said bank, which was duly paid to said town; that said town ever since has kept and used said money and appropriated it to its own use; that said town recovered said money in said action against said Wilson, and said bank, on the ground that said sum was the proceeds of the sale of the very bonds in suit, which had been deposited by said Wilson in said bank to his credit as trustee, and the supreme court of Indiana affirmed the judgment of the court below, and the money was thereupon paid to the said town, who has ever since kept, used, and appropriated the same; that before that time, and on the twenty-fifth day of June, 1880, said

town of Monticello, on proper proceedings begun in the proper courts of said state, did recover final judgment against said Wilson on his bond executed by him for the purposes aforesaid for the residue of said bonds, to wit, $15,000, which judgment was appealed from the Jasper circuit court to the supreme court of the state, when it was removed and remanded, after which the case was dismissed and wholly discontinued by said town.

Wherefore said plaintiff says that the said town of Monticello has ratified and affirmed the acts of the said Wilson in the premises, and, having received from him the proceeds of the said bonds in suit or a part thereof, can not now deny or impeach the action of the said Wilson in the sale thereof or their validity.

ROACHE & LAMME,
HARRIS & CALKINS,
Attorneys for Complainant.

And afterwards, to wit, at the November term of said court, on the twenty-third day of November, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Demurrer.

Comes now the defendant, by D. Turpie and W. E. Uhl, its attorneys, and files its demurrer to the amended fourth paragraph of plaintiff's reply to the sixth paragraph of defendant's answer herein the words following, to wit:

The defendant demurs to the amended fourth paragraph of reply of the plaintiff to the sixth paragraph of the defendant's answer, and for cause shows:

That said paragraph of reply does not contain a statement of facts sufficient in law to constitute a defense to the said sixth paragraph of the defendant's answer.

D TURPIE,
W. E. UHL,
Defendant's Attorneys.

An afterwards, to wit, at the May term of said court, on the nineteenth day of October, 1886, before the Honorable Walter Q. Gresham and Honorable William A. Woods, judges of said court, the following further proceedings in the above entitled cause were had, to wit:

Finding for Plaintiffs.

Come now the parties, by their respective attorneys, and this cause now coming on to be heard is submitted to the court for trial without the intervention of a jury, and the court, having heard the evidence and argument of counsel, and being sufficiently advised in the premises, finds for the defendant.

And afterwards, to wit, at the May term of said court, on the twenty-first day of October, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Comes now the plaintiff, by Roache & Lamme and Harris & Calkins, his attorneys, and files his motion for a new trial herein in the words following, to wit:

Motion for New Trial.

Comes now the plaintiff in the above entitled suit and moves the court for a new trial herein for the following reasons, to wit:

1. The finding of the court is contrary to law.

2. The finding of the court is contrary to the evidence and not sustained by the evidence.

Wherefore the plaintiff prays that a new trial may be granted, etc.

ROACHE & LAMME,
HARRIS & CALKINS,
Attorneys for Plaintiff.

And afterwards, to wit, at the November term of said court, on the twenty-seventh day of December, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Order Denying Motion for New Trial.

Come now the parties, by their respective solicitors, and thereupon the court, being sufficiently advised, doth now overrule the motion of the plaintiff for a new trial.

Judgment.

It is thereupon ordered by the court that the plaintiff take nothing by his action herein, and that the defendant do recover of the plaintiff its costs and charges in this behalf laid out and expended, taxed at $—.

Allowance of Appeal.

And the plaintiff now prays an appeal to the supreme court of the United States, which is granted upon his filing a bond in the sum of $1,000, with sureties to the approval of the court, and sixty days is allowed for time to file a bill of exceptions.

And afterwards, to wit, at the November term of said court, on the seventeenth day of February, 1887, before the Honorable Walter Q. Gresham and Honorable William A. Woods, judges of said court, the following further proceedings in the above entitled cause were had, to wit:

Comes now the plaintiff, by Roache & Lamme and Harris & Calkins, his attorneys, and files his motion to set aside the judgment herein, which motion is in the words following, to wit:

Motion to Set Aside Judgment.

The plaintiff, Abner L. Merrill, shows to your honors that on the first day of July, 1881, he filed his declaration in this court, founded upon certain municipal bonds issued by the defendant, and of which the plaintiff was the owner, and asked a judgment thereon against the defendant, the town of Monticello.

That afterward, to wit, on the twentieth day of February, 1882, the said defendant filed its seven paragraphs of amended answer to said declaration, which were held good by the court, and an opinion was delivered thereon, which is reported in the — Federal Reporter at page —.

That afterward, to wit, on the eighteenth day of June, 1883, the said plaintiff filed his replication to said answer in four paragraphs, three of which were special replies and are now remaining of record in said cause.

And the plaintiff shows to your honors that a demurrer was filed to the second and third paragraphs of said reply, which were elaborately argued, and said demurrer was overruled on the eighteenth day of December, 1884, as reported in the —— Federal Reporter, at page —.

That thereafter and by leave of the court a fourth paragraph of reply was filed, to which a demurrer was interposed, and which has never been ruled upon; and said demurrer was pending, undisposed of, at the time hereinafter mentioned, and which the plaintiff says was manifest error in the record and proceedings in said cause, because if said demurrer is sustained to said paragraph it presents a question of law of which the plaintiff might avail himself on appeal.

And the plaintiff shows to your honors that afterwards, to wit, on the twenty-seventh day of May, 1885, this cause was submitted to the court for trial, and the intervention of a jury was waived in writing by a stipulation of the parties entered of record.

That afterward the cause was partially heard, but before it was finally determined the said defendant asked that the presiding judge of the circuit court be called by the district judge to sit with him in the hearing and determining of the questions involved upon the evidence theretofore taken, heard, and reduced to writing and in the final hearing and determination of the cause.

And thereupon the said district judge did call on the presiding judge of the said circuit court to hear the said cause on its final argument upon the evidence already adduced and then in writing before said court.

And the plaintiff shows that said hearing took place on or about the twenty-seventh day of May, 1885, and that afterward, on the nineteenth day of October, 1886, the court ordered that finding and judgment be entered for the said defendant.

Afterward, on the twenty-first day of October, 1886, a motion for a new trial was filed by the plaintiff in said cause, which was, on the twenty-seventh day of December, 1886, overruled by the district judge, sitting as circuit judge, and an entry thereof duly made, and sixty days were thereupon given to make and file a bill of exceptions, and said sixty days have not yet expired.

And the plaintiff now shows to your honors that he has prepared the bill of exceptions, and exhibits it herewith, containing all the evidence in said cause, and that the evidence supports the allegations of the declaration herein, as well as the second, third and fourth paragraphs of his replication to the answer of said defendant, and that there is no conflict of evidence upon the points at issue whatever.

And the plaintiff shows that he is desirous of appealing said cause to the supreme court of the United States by writ of error duly issued as in such cases made and provided, but he shows to your honors that, under the rules and practice of said supreme court and statutes of the United States, he will not be able to present the questions involved in said cause to the supreme court unless your honors should make and find specially that the facts and evidence adduced on the trial support said declaration and paragraphs of replication and each of them or one or more of them, and that, notwithstanding such is the fact, the court is of opinion that the said plaintiff is not enti-

tled to recover as against said defendant on said bonds sued on in said complaint.

And the plaintiff shows to your honors that a manifest hardship and injustice has been done him in said cause, which occurred in this way, namely, that the judge who presided and ruled upon said answer held the same sufficient, and that afterward, when the replications were filed and a demurrer was interposed to them, a different judge presided and ruled upon them, and that at the final hearing of the cause the plaintiff relied upon the evidence which supported and proved his said replication and did not require a special finding because of the fact that said replication had successfully resisted a demurrer, and, having proved them to be true, he supposed that there would either be a certificate of division between the said judges who heard and determined said cause, or that, if not, he would have saved to him by the record the questions of law involved in some other proper manner.

And the plaintiff shows to the court that the entry of the judgment took him wholly by surprise and was entirely unexpected, and he was, therefore, thrown off of his guard and did not, as he should have done, properly save the question by requesting beforehand a special finding.

That this was inadvertence on his part, caused by the fact that, having had his replication sustained, he had no doubt of the final judgment of the court being favorable to him, and was for that reason surprised at the announcement of the general finding against him.

And the plaintiff further shows to your honors that he is fearful that he will be remediless to present to the supreme court the questions involved unless your honors shall set aside the order overruling the motion for a new trial and grant the same and find specially the facts as your petitioner believes them to be and as hereinbefore stated, and the plaintiff now invokes the aid of the court in saving to him his rights, that he may be able to present the questions to the supreme court on a proper writ of error in this case.

The plaintiff therefore humbly prays that your honors will set aside the judgment overruling his motion for a new trial, and that your honors will sustain the same, to the end that he may be able to present the questions involved to the supreme court, as before stated.

ROACHE & LAMME,
HARRIS & CALKINS,
Attorneys for Plaintiff.

And afterwards, to wit, at the November term of said court, on the eighteenth day of February, 1887, before the Honorable Walter Q. Gresham and Honorable William A. Woods, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Motion to Set Aside Application to Vacate Judgment.

Comes now the defendant, by David Turpie, his attorney, and files his motion to set aside the application of the plaintiff filed herein on the seventeenth instant, which motion is in the words following, to wit:

The defendant moves the court to dismiss the motion of the plaintiff on file February 17, 1887, for the reasons below given:

1. The motion is not competent, because it prays the setting aside the action and a ruling upon a motion for a new trial without moving to set aside the judgment.

2. The final judgment has been rendered in said cause, and no reasons are given or verified for setting aside the same.

3. That the action or non-action of the court upon a demurrer being part of the pleadings is no cause for new trial, even if it had been set out as such cause, which it is not herein.

That the plaintiff failed to ask a special finding at the trial upon the facts and law of the case and the questions therein is no cause for a new trial or for any relief therein.

That the motion, made nearly one hundred and twenty days after final judgment, is made without any diligence. If competent at all it should have been made upon any of the causes therein at the time the motion for new trial was made.

That surprise only relates to evidence upon trial, not to the finding or verdict upon trial.

That a special finding upon questions of fact and conclusions of law can only be required at the trial upon request of the parties. It is too late to make such request after the court has commenced its judgment, the announcement thereof, much more after the court has announced its judgment and many days after the entry of said judgment.

Final judgment was entered in this case October 19, 1886, being in the last May term hereof, not of the present term; that said judgment can only therefore be now set aside, it at all, by complaint and summons on the ground of mistake, inadvertence, surprise or excusable neglect, neither of which causes are shown or verified in said application.

D. TURPIE.

Order Granting Extension of Time to File Bill of Exceptions.

And afterwards, to wit, at the November term of said court, on the nineteenth day of February, 1887, before the Honorable Walter Q. Gresham and Honorable William A. Woods, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

On motion, the complainant is given thirty days' additional time to make and file his bill of exceptions herein. This is in addition to the sixty days heretofore given.

And afterwards, to wit, at the November term of said court, on the sixteenth day of March, 1887, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

The court, being sufficiently advised in the premises, does now order that the time for filing bill of exceptions by the plaintiff in the said cause be, and the same is hereby, extended to April 20, 1887.

And afterwards, to wit, at the November term of said court, on the eighteenth day of April, 1887, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and upon consideration of the motion of the plaintiff filed February 17, 1887, and of the objections of the defendant thereto, filed February 18, 1887, which are in the words following, to wit:

Order Granting New Trial.

It is ordered that the ruling heretofore made upon the plaintiff's motion for a new trial, whereby said motion was overruled, be, and the same is hereby, set aside, together with the judgment herein rendered; and it is further ordered that the said motion for a new trial be, and the same is now sustained, and a new trial is granted; to which rulings and orders and to each of them separately the defendant now and here excepts, and is given sixty (60) days within which to file a bill of exceptions.

And afterwards, to wit, at the November term of said court, on the twenty-third day of April, 1887, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by David Turpie, Esq., its attorneys, and files its bill of exceptions to the order of the court of April 18, 1887, in the words following, to wit:

Bill of Exceptions by Defendant.

Be it remembered that on the eighteenth day of April, 1887, the circuit court, being held by Judge Woods, of the district court, having under consideration the motion of the plaintiff of February 17, 1887, filed by the plaintiff, and the counter-motion of February 18, 1887, filed by the defendant, it was ordered that the ruling heretofore made upon the plaintiff's motion for new trial, wherein said motion was overruled, be, and the same is hereby, set aside; to which order the defendant excepted at the time and now excepts, and asks that this his bill of exceptions may be signed and sealed.

And the said district judge, acting as circuit judge aforesaid, on the same day aforesaid set aside the judgment hereinbefore rendered, and further ordered that the motion for a new trial herein be, and the same is now sustained, and that a new trial be granted herein; to which rulings and orders, all and each of them, the defendant excepted at the time and does now except, and asks that this his bill of exceptions be now signed and sealed and made a part of the record, which is accordingly done this —— day of April, 1887.

And afterwards, to wit, at the November term of said court, on the twenty-sixth day of April, 1887, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Now again come the parties, and this cause is submitted for trial, the intervention of a jury having been previously waived in writing, and, after hearing the evidence and argument of counsel and being duly advised in the premises, the court doth now make, at the request of the plaintiff, a special finding of all the facts in said cause in the words following, to wit:

Upon request of plaintiff in the above-entitled cause the court makes a special finding of the facts as follows:

Special Findings of Facts.

1. At the time hereinafter mentioned the defendant was a municipal corporation organized and existing under and by virtue of the laws of the state of Indiana and situate in the county of White, in the said state.

2. That upon the twenty-fourth day of January, 1869, a petition was pre-

sented to the board of trustees of said town by the school trustees thereof praying for the issue of the bonds of said town to aid in the building of a school-house in said town, which said petition was granted, and in pursuance thereof the trustees of said town did pass and adopt an ordinance directing that there should be made and issued to the said school trustees of said town twenty thousand dollars of coupon bonds of said town of the denomination of one hundred dollars each, with interest at the rate of ten per cent. per annum, payable annually; and afterwards, to wit, on the first day of May, 1869, the said town executed the said bonds under said ordinance to the amount of twenty thousand dollars, maturing in ten years after the date thereof, which bonds were sold and delivered to certain persons, who then and there became the purchasers thereof, and which bonds at the times hereinafter mentioned were outstanding, unpaid, and valid obligations of the said town.

3. On the eleventh day of May, 1878, a petition was presented to the board of trustees of the defendant, signed by citizens, owners of taxable property in said town, praying for the issue of bonds of said town to the amount of twenty-one thousand dollars, which petition (omitting the names of the signers thereto) is in the words following, to wit:

"We, the undersigned, citizens of the town of Monticello, Indiana, and owners of the taxable property therein, respectfully petition that you, as trustees of said town, contract a loan for said town for the purpose of paying the indebtedness thereof in the sum of twenty-one thousand dollars."

May 11, 1878. (Signed names.)

That thereupon the board of trustees of the defendant passed and entered of record the following ordinance, to wit:

"Be it ordained by the board of trustees of the town of Monticello, Indiana, That said town issue bonds in the sum of twenty-one thousand dollars in denominations of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town. And be it further ordained that when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the board of trustees, for negotiation and sale. And be it further ordained that said bonds shall not be sold at a price less than ninety-four cents on the dollar."

4. That upon the twentieth day of May, 1878, in pursuance of the said petition and ordinance, the said defendant town made and executed its 210 coupon bonds, payable to bearer, of the denomination of one hundred dollars each, bearing interest at the rate of seven per centum per annum, which bonds and coupons are in the words and figures following, to wit:

No. 1. UNITED STATES OF AMERICA $100.

STATE OF INDIANA,

FUNDING BOND OF THE TOWN OF MONTICELLO.

Ten years after date the town of Monticello, in the county of White, state of Indiana, promises to pay to the bearer, at the Importers' and Traders' National Bank, New York, one hundred dollars in gold, with interest thereon at the rate of seven per centum per annum, payable annually, in gold, at the same place, upon presentation of the proper coupon hereto attached, without any relief whatever from the valuation or appraisement laws of the state of Indiana. The principal of this bond shall be due and

payable, at the option of the holder, on the non-payment, after due presentation, of any of said coupons for ninety days after the maturity thereof. This bond is one of a series of $21,000 authorized by the said town by an ordinance passed by the board of trustees thereof on the thirteenth day of May, 1878, for the purpose of funding the indebtedness of the said town.

In witness whereof, The board of trustees of the town of Monticello have caused this bond and the coupons thereof to be signed by their president and clerk and the seal of the town to be affixed hereto, at the said town of Monticello, this twentieth day of May, 1878.

R. W. Christy, President.

Attest: F. Bosinger, Clerk.

(Copy of Coupon.)

The town of Monticello, Indiana, will pay the bearer, in gold coin, seven dollars, without relief from valuation or appraisement laws of the state of Indiana, at the Importers' and Traders' National Bank, New York, on the twentieth day of May, 1880, being one year's interest on bond No. 1.

R. W. Christy, President.

Attest: F. Bosinger, Clerk.

5. That the said bonds were put in the hands of the said J. C. Wilson, in pursuance of said ordinance, for sale, and that $14,300 of the said bonds, being the same as those now in suit, were sold to Claypool & Stoddard, of Indianapolis, Indiana, for which the said firm of Claypool & Stoddard paid to the said Wilson the sum of $12,918.40, which said last-named sum was paid to the said Wilson in the following manner: On or about April 14, 1879, said Claypool & Stoddard, by the direction of said Wilson, paid a draft, drawn by G. A. Ivers, of Chicago, for $6,000; on same day said Claypool & Stoddard paid said Wilson, by their check on the First National Bank of Indianapolis, the further sum of $5,000; that on the thirteenth day of May, 1879, the said Claypool & Stoddard paid to said Wilson, by their check on the First National Bank of Indianapolis, the further sum of $1,840.30 and within a few days after the last-named date said Claypool & Stoddard, for the balance of the said sum of $12,918.40, paid to him the sum of $78.17.

6. That the board of trustees of said town required and exacted from their said agent, J. C. Wilson, a bond, with sureties, to secure the money which he might realize from the sale of said bonds.

7. That the said Wilson, after the sale of said bonds, failed to turn over the proceeds thereof to the treasurer of the said town and fled the country.

8. That at the time the said Wilson fled the country, he had a large sum of money on deposit in the First National Bank of Monticello, Indiana, to his credit as "trustee;" that suit was instituted by the defendant town against said bank to recover the same, upon the ground that such money was the proceeds of the sale of said bonds so made by the said Wilson; that judgment was rendered in favor of said town against said bank for the sum of $6,988.43; that thereupon the receiver of the said bank appealed to the supreme court of Indiana, and thereupon said judgment was affirmed by said supreme court (Bundy, receiver, etc., *v.* Town of Monticello, 84 Ind. 119), and said town recovered the sum of $6,988.43.

9. That the said town instituted a proceeding upon the bond so given by

the said Wilson to the said town to secure the money which he might realize from the sale of said bonds, and in a court of competent jurisdiction recovered judgment against the sureties and the said Wilson on the said bond for the full amount of the proceeds arising from the sale of said bonds, and from which judgment an appeal was taken to the supreme court of Indiana and reported in 85 Indiana Reports, at page 10, and which said judgment was reversed and remanded by said supreme court for another trial, and afterwards the said suit was dismissed by the said town, and that the said town has received nothing on account of said bond.

10. That at the time of the issuing of the bonds in suit there was in the town treasury $3,047.85, and no more, received under the taxing act of the legislature of Indiana under which the bonds were issued as a special fund for the payment of the $20,000 ten per cent. bonds then outstanding, and that under the laws of the state of Indiana a sum sufficient to pay said bonds could not have been raised before maturity of the same on the amount of taxable property in said town.

11. That the plaintiff is a resident of Newton, in the state of Massachusetts, and that he bought the bonds in suit in open market, in the city of Boston, as an investment, and paid therefor a valuable consideration, without any notice of any irregularity as to their issue or any claim to that effect.

And the court further finds that the principal of the bonds sued on is wholly unpaid, and that the interest upon the same accrued is wholly unpaid from the twentieth day of May, 1880.

And the court further finds as a conclusion of law upon the foregoing facts for the defendant.

And the plaintiff, Abner L. Merrill, objects and excepts to the conclusion of law so stated by the court upon said findings.

And thereupon the above and foregoing bill of exceptions is now made and tendered by the plaintiff, and which, being examined, is now approved by the court, and the same is ordered to be made a part of the record, and is now signed by the judge of said court this twenty-sixth day of April, 1887.

Wm. A. Woods, U. S. Judge.

And upon which findings the court finds for said defendants.

Judgment.

It is therefore ordered and adjudged that the plaintiff take nothing by his said action, and that the defendant do recover of and from the plaintiff his costs herein laid out and expended, taxed at $——; to which said judgment, upon said finding of facts, the said plaintiff doth now object and except, and doth now pray the court that a writ of error be granted therefrom to the supreme court of the United States. The premises considered, the court doth now grant such writ of error, and doth now fix the bond of said plaintiff in the sum of one thousand dollars, with good and sufficient sureties, to be approved by the clerk of this court; and the said plaintiff doth now present his bill of exceptions, preserving the special findings of fact and the conclusions of law thereon of this court, which is in the words following, to wit:

Bill of Exceptions by Plaintiff.

Be it remembered that the following stipulation was made and signed by the respective parties to this action and filed in the office of the clerk of said

court on the twenty-seventh day of May, 1885, in open court, to wit:

The plaintiff and defendant do now, in open court, waive a trial of the issues herein by a jury and submit the same for trial to the court.

D. Turpie and W. E. Uhl,
Attorneys for Defendant.
Harris & Calkins, and
Roache & Lamme,
Attorneys for Plaintiff.

Be it further remembered that on the twenty-sixth day of April, 1887, said cause, being at issue, is now submitted to the court for trial, and the plaintiff requested the court to find specially all the facts in said cause and state the conclusions of law thereon; and the court doth now find all of the facts in said cause and states its conclusions of law thereon as follows:

Upon request of the plaintiff in the above entitled cause the court makes a special finding of the facts as follows:

[Here the special finding above set forth is again set out in full.]

And the court finds, as a conclusion of law upon the foregoing facts, for the defendant; and the plaintiff, Abner L. Merrill, objects and excepts to the conclusions of law so stated by the court upon said findings.

And thereupon the above and foregoing bill of exceptions is now made and tendered by the plaintiff, and which, being examined, is now approved by the court, and the same is ordered to be made a part of the record, and is now signed by the judge of said court this twenty-sixth day of April, 1887.

And the same is now examined, approved and signed in open court, and the same is made a part of the record in this cause.

Stipulation.

Under the statute of Indiana a separate paragraph of complaint is required on each bond and coupon sued on. The foregoing record contains ten (10) paragraphs of the complaint, in each of which the bonds and coupons are copied and referred to as exhibits to such paragraphs. The whole number of bonds sued on is one hundred and forty-three (143). It is stipulated and agreed that each of the paragraphs of the original complaint, containing in all one hundred and forty-three paragraphs, is, with respect to their contents and the exhibit, copies of bonds and coupons therein referred—identical and the same with those set out in the ten paragraphs contained in the foregoing record, with the exception of date of maturity of coupons and the numbers. It is therefore stipulated and agreed that the foregoing is a complete record of the cause herein as to the said paragraphs and exhibits.

Harris & Calkins,
Att'ys for Pl'ff in Error.
D. Turpie,
W. E. Uhl, Def't's Att'ys.

Appeal Bond.

(Copy.)

SUPREME COURT OF THE UNITED STATES.

ABNER L. MERRILL
v.
THE TOWN OF MONTICELLO. } No. 7,260.

Know all men by these presents, That we, Abner L. Merrill, as principal, and George L. Ilsley, of Exeter, in the state and district of New Hampshire, and Henry R. Merrill, of Boston, in the state and district of Massachusetts, as sureties, are held and firmly bound unto the above-named town of Monticello in the sum of one thousand dollars ($1,000), to be paid to said town of Monticello; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors and administrators, jointly by these presents.

Sealed with our seals and dated this twenty-first day of June, 1887.

Whereas, the above-named Abner L. Merrill hath prosecuted a writ of error to the supreme court of the United States to reverse the judgment rendered in the above entitled suit by the circuit court of the United States for the district of Indiana: Now, therefore, the condition of this obligation is that if the above-named Abner L. Merrill shall prosecute his said writ of error to effect and answer all costs and damages that may be adjudged or awarded against him if he shall fail to make good his plea, then this obligation to be void, otherwise in full force.

ABNER L. MERRILL. [SEAL.]
GEO. L. ILSLEY. [SEAL.]
HENRY R. MERRILL. [SEAL.]

Sealed and delivered in the presence of—
JOHN G. STETSON.

BOSTON, MASS., June 21, 1887.

I, Le Baron B. Colt, judge of the circuit court of the United States for the first circuit, within which the district of Massachusetts is, after due inquiry, approve the above sureties as sufficient.

LE BARON B. COLT,
U. S. Circuit Judge.

Approved this June 23, '87. W. A. WOODS.

I, George L. Ilsley, of Exeter, in the state of New Hampshire, on oath depose and say that I own unincumbered real estate in Chelsea, Mass., worth ten thousand dollars ($10,000) above all encumbrance. I have personal property worth five thousand dollars ($5,000), and I am worth fifteen thousand dollars ($15,000) above all debts and liabilities. GEO. L. ILSLEY.

I, Henry R. Merrill, of Boston, in the state of Massachusetts, on oath depose and say that I own unincumbered real estate in said Boston and Brookline worth ten thousand dollars ($10,000). I have personal property worth one thousand dollars ($1,000), and I am worth ten thousand dollars ($10,000) above all debts and liabilities. HENRY R. MERRILL.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, } ss:

JUNE 22, 1887,

Subscribed and sworn to before me. JOHN G. STETSON,
Commissioner U. S. C. C., Mass. Dist.

[Indorsed:] No.— Abner L. Merrill *v.* Town of Monticello.

Clerk's Certificate.

UNITED STATES OF AMERICA, DISTRICT OF INDIANA, } ss:

I, Noble C. Butler, clerk of the circuit court of the United States for said district, do hereby certify that the above and foregoing is a full, true and complete transcript of the record of the cause of Abner L. Merrill *v.* The Town of Monticello, No. 7,260, as fully as the same appears of record and remains on file in my office.

[Seal circuit court of the United States, District of Indiana.] Witness my hand and the seal of said court at Indianapolis, in said district, this twenty-ninth day of July, 1887. NOBLE C. BUTLER, Clerk.

Indorsed on cover: Indiana C. C. U. S. No. 125. Abner L. Merrill, plaintiff in error, *v.* The town of Monticello. Filed September 29, 1887.

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